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**Supreme Court of the United States**

**OCTOBER TERM, 1938**

**No. 666**

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**CHIPPEWA INDIANS OF MINNESOTA, APPELLANT,**

**THE UNITED STATES**

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**APPEAL FROM THE COURT OF CLAIMS**

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**FILED FEBRUARY 11, 1939.**

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 666

CHIPPEWA INDIANS OF MINNESOTA, APPELLANT,

vs.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

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[fol. 1]

**IN COURT OF CLAIMS OF THE UNITED STATES**

No. H-155

**CHIPPEWA INDIANS OF MINNESOTA**

**VS.**

**THE UNITED STATES**

**I. HISTORY OF PROCEEDINGS**

On April 13, 1927, the plaintiffs filed their original petition.

On May 23, 1927, the defendant filed a general traverse to said petition.

On August 18, 1930, by leave of court, the plaintiffs filed an amended petition.

On September 27, 1930, the defendant filed a general traverse to the amended petition.

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On August 22, 1935, by leave of court, the plaintiff filed a Second Amended Petition, which is as follows:

**II. SECOND AMENDED PETITION—Filed August 22, 1935**

Plaintiffs, the Chippewa Indians of Minnesota, respectfully show unto the court:

1. That plaintiffs constitute a designated class of persons [fol. 2] described as "all the Chippewa Indians in the State of Minnesota" in an agreement or agreements duly entered into with the United States pursuant to the Act of January 14, 1889 (25 Stat. at L., p. 642), and hereinafter more particularly described, by the terms of which plaintiffs as such class became and are entitled to the sole and exclusive beneficial interest in and to the trust thereby created and to the proceeds received from the lands and timber set apart in said agreements to be sold and disposed of as therein specifically directed, which proceeds constitute the corpus of said trust, and to have and to receive said corpus in equal shares upon the termination thereof. Plaintiffs bring this

suit under and by virtue of the authority contained in an Act of Congress approved May 14, 1926 (44 Stat. at L., 555), providing as follows:

**"An Act Authorizing the Chippewa Indians of Minnesota to Submit Claims to the Court of Claims**

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That jurisdiction be, and is hereby, conferred upon the Court of Claims, with right of appeal to the Supreme Court of the United States by either party as in other cases, notwithstanding the lapse of time or statutes of limitation, to hear, examine, and adjudicate and render judgment in any and all legal and equitable claims arising under or growing out of the Act of January 14, 1889 (Twenty-fifth Statutes at Large, page 642), or arising under or growing out of any [fol. 3] subsequent Act of Congress in relation to Indian affairs which said Chippewa Indians of Minnesota may have against the United States, which claims have not heretofore been determined and adjudicated on their merits by the Court of Claims or the Supreme Court of the United States.

Sec. 2. Any and all claims against the United States within the purview of this Act shall be forever barred unless suit or suits be instituted or petition filed as herein provided in the Court of Claims within five years from the date of the approval of this Act, and such suit or suits shall make the Chippewa Indians of Minnesota party plaintiff and the United States party defendant. The petition shall be verified by the attorney or attorneys employed to prosecute such claim or claims under contract with the said Chippewa Indians approved in accordance with existing law; and said contract shall be executed in their behalf by a committee or committees to be selected by said Chippewa Indians as hereinafter provided. Official letters, papers, documents, and records, or certified copies thereof, may be used in evidence, and the departments of the Government shall give access to the attorney or attorneys of said Chippewa Indians to such treaties, papers, correspondence, or records as they may require in the prosecution of any suit or suits instituted under this Act.

Sec. 3. In said suit or suits the court shall also hear, examine, consider, and adjudicate any claims which the United

States may have against the said Chippewa Indians, and any payment or payments which may have been made by the United States upon any claim against the United States by [fol. 4] said Indians shall not operate as an estoppel, but may be pleaded as an offset in such suit or suits as may gra-  
tuities, of any, paid to or expended for said Indians subse-  
quent to January 14, 1889.

Sec. 4. If it be determined by the court that the United States, in violation of the terms and provisions of any law, treaty, or agreement as provided in section 1 hereof, has unlawfully appropriated or disposed of any money or other property belonging to the Indians, damages therefor shall be confined to the value of the money or other property at the time of such appropriation or disposal, together with interest thereon at 5 per centum per annum from the date thereof; and with reference to all claims which may be the subject matter of the suits herein authorized, the decree of the court shall be in full settlement of all damages, if any, committed by the Government of the United States and shall annul and cancel all claim, right, and title of the said Chippewa Indians in and to such money or other property.

Sec. 5. If in any suit by all the Chippewas of Minnesota against the United States it appears to the court that any band or bands of said Indians are, or claim to be, the exclusive legal or equitable owners, or are entitled to, or claim, a legal or equitable interest greater than an equal distributive share with all the Chippewa Indians of Minnesota, in the proceeds of any judgment or decree that may be entered or passed in settlement of any claims submitted hereunder, the court may permit, or of its own motion compel said band or bands to be made parties to any such suit, so that their rights may be fully and finally determined: Pro-  
[fol. 5] vided, however, That nothing herein contained shall be construed as conferring jurisdiction on the court to entertain and hear complaints or claims of a purely individual nature. In the event that any band or bands of said Indians are made parties to any suit herein authorized, the Secretary of the Interior shall ascertain, in such manner as he may deem best, the attorney desired by a majority of said Indians and shall permit the employment of an attorney under contract to represent them as provided by existing law, the compensation to be paid said attorney to be fixed by the Secretary of the Interior, and paid out of any money

in the Treasury to the credit of said band or bands of said Indians.

Sec. 6. Authority is hereby given for the employment of not to exceed two attorneys or firms of attorneys to represent the Chippewa Indians of Minnesota in the prosecution of any such suit. Under the direction of the Secretary of the Interior the Indians belonging on the White Earth Reservation are authorized to select a committee consisting of five of their members, and all the other Chippewa Indians in Minnesota are authorized to select a like committee from their members. Each committee so selected, or a majority thereof, is authorized to designate an attorney or firm of attorneys and to execute a contract with such attorney or firm in accordance with section 2 hereof.

Sec. 7. The two attorneys or firms of attorneys authorized to be employed under section 6 shall each receive, during their employment, compensation at the rate of \$6,000 per annum, for a period of not exceeding five years, payable [fol. 6] in monthly installments as the same become due, and the Secretary of the Treasury is hereby authorized and directed to pay said amounts or installments out of the trust funds standing to the credit of said Indians in the Treasury of the United States, and upon the final determination of said suit the Court of Claims may separately allow said attorneys, or firms of attorneys, such additional compensation as it may deem just and proper considering the nature, extent, character, and value of all services rendered, but in no event shall said additional compensation for the two attorneys or firms of attorneys be in excess of 5 per centum of the total amount recovered; and in no event shall such additional compensation for the two attorneys or firms of attorneys exceed \$40,000: Provided, That any such additional compensation shall be fixed by said court in its decree and shall be paid by the Secretary of the Treasury as herein authorized from the trust funds of said Indians standing to their credit in the Treasury of the United States.

Sec. 8. All actual and necessary expenses incurred in the prosecution of said suit by the attorney or attorneys so employed to represent the Chippewa Indians of Minnesota shall be paid by the Secretary of the Treasury as herein authorized as they arise out of the funds standing to the credit of said Indians in the Treasury of the United States



upon first being allowed by said court and certified to the Secretary of the Interior.

Sec. 9. Should either of the Indian committees referred to in section 6 hereof be unable or unwilling within one year [fol. 7] from the approval by the Secretary of the Interior of the selection of said committees, to designate an attorney or firm of attorneys, the Commissioner of Indian Affairs and the Secretary of the Interior, on behalf of the Indians, are hereby authorized to execute a contract with an attorney or attorneys under such terms and conditions as they may deem advisable, not inconsistent with the terms of this Act.

Sec. 10. The proceeds of all amounts, if any, recovered for said Indians shall be deposited in the Treasury of the United States to the credit of the Indians decreed by said court to be entitled thereto, and shall draw interest at the rate of 5 per centum per annum from the date of the judgment or decree. The costs incurred in any suit hereunder shall be taxed against the losing party; if against the United States such costs shall be included in the amount of the judgment or decree, and if against said Indians shall be paid by the Secretary of the Treasury out of the funds standing to their credit in the Treasury of the United States.

Approved, May 14, 1926."

2. On January 14, 1889, and for many years prior thereto, various bands or tribes of Chippewa Indians, formerly a part of the great Chippewa tribe, occupied twelve reservations lying and situated within the limits of the State of Minnesota, which said reservations embraced all the lands within the limits of said state to which the Indian title had not been extinguished. Pursuant to authority contained in the Act of May 15, 1886 (24 Stat. 44), the United States [fol. 8] endeavored to secure agreements with said bands or tribes of Indians, for a readjustment of their land holdings. The agreements negotiated proved unsatisfactory, and the Congress of the United States conceived a definite and special plan for the complete disposition of all the lands and timber embraced in said twelve reservations, which said special plan was embodied in a Bill, H. R. 7935, 50th Cong., 1st Session, and more fully explained in the report of the House Committee on Indian Affairs, H. R. Report #789, 50th Cong., 1st Session, accompanying said Bill, and which



said Bill and Report are made a part hereof by reference. This special plan was to become effective only of assented to in writing by the individual Indians in manner and form therein provided. The said Bill, H. R. 7935, became the act of January 14, 1889 (25 Stat. 642), which is in words and figures, as follows:

**"An Act for the Relief and Civilization of the Chippewa Indians in the State of Minnesota.**

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President of the United States is hereby authorized and directed, within sixty days after the passage of this act, to designate and appoint three Commissioners, one of whom shall be a citizen of Minnesota, whose duty it shall be, as soon as practicable after their appointment, to negotiate with all the different bands or tribes of Chippewa Indians in the State of Minnesota for the complete cession and re-[fol. 9] linquishment in writing of all their title and interest in and to all the reservations of said Indians in the State of Minnesota, except the White Earth and Red Lake Reservations, and to all and so much of these two reservations as in the judgment of said commission is not required to make and fill the allotments required by this and existing acts, and shall not have been reserved by the Commissioners for said purposes, for the purposes and upon the terms hereinafter stated; and such cession and relinquishment shall be deemed sufficient as to each of said several reservations, (except as to the Red Lake Reservation,) if made and assented to in writing by two-thirds of the male adults over eighteen years of age of the band or tribe of Indians occupying and belonging to such reservations; and as to the Red Lake Reservation the cession and relinquishment shall be deemed sufficient if made and assented to in like manner by two-thirds of the male adults of all the Chippewa Indians in Minnesota; and provided that all agreements therefor shall be approved by the President of the United States before taking effect: Provided further, That in any case where an allotment in severalty has heretofore been made to any Indian of land upon any of said reservations, he shall not be deprived thereof or disturbed therein except by his own individual consent separately and previously given, in such form and manner as may be prescribed by the Secretary

of the Interior. And for the purpose of ascertaining whether the proper number of Indians yield and give their assent as aforesaid, and for the purpose of making the allotments [fol. 10] and payments hereinafter mentioned, the said commissioners shall, while engaged in securing such cession and relinquishment as aforesaid and before completing the same, make an accurate census of each tribe or band, classifying them into male and female adults, and male and female minors; and the minors into those who are orphans and those who are not orphans, giving the exact numbers of each class, and making such census in duplicate lists, one of which shall be filed with the Secretary of the Interior and the other with the official head of the band or tribe; and the acceptance and approval of such cession and relinquishment by the President of the United States shall, be deemed full and ample proof of the assent of the Indians, and shall operate as a complete extinguishment of the Indian title without any other or further act or ceremony whatsoever for the purposes and upon the terms in this act provided.

Sec. 2. That the said commissioners shall, before entering upon the discharge of their duties, each give a bond to the United States in the sum of ten thousand dollars, with sufficient sureties, to be approved by the Secretary of the Interior, and conditioned for the faithful discharge of their duties under this act, and they shall also each take an oath to support the Constitution of the United States and to faithfully discharge the duties of their office, which bonds and oaths shall be filed with the Secretary of the Interior. Said commissioners shall be entitled to a compensation of ten dollars per day for each day actually employed in the discharge of their duties, and for their actual traveling [fol. 11] expenses and board, not exceeding three dollars per day. Said commissioners shall also be authorized to employ a competent interpreter while engaged in the performance of their duties, at a compensation and allowance to be fixed by them, not in excess of that allowed to each of them under this act.

Sec. 3. That as soon as the census has been taken, and the cession and relinquishment has been obtained, approved, and ratified, as specified in section one of this act, all of said Chippewa Indians in the State of Minnesota, except those on the Red Lake Reservations, shall, under the direction of

said commissioners, be removed to and take up their residence on the White Earth Reservation, and thereupon they shall, as soon as practicable, under the direction of said commissioners, be allotted lands in severalty to the Red Lake Indians on Red Lake Reservation, and to all the other of said Indians on White Earth Reservation, in conformity with the act of February eighth, eighteen hundred and eighty-seven, entitled "An act for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes"; and all allotments heretofore made to any of said Indians on the White Earth Reservation are hereby ratified and confirmed with the like tenure and condition prescribed for all allotments under this act: Provided, however, That the amount heretofore allotted to any Indian on White Earth Reservation shall be deducted from the amount of allotment to which he or she is entitled under [fol 12] this act: Provided further, That any of the Indians residing on any of said reservations, may, in his discretion, take his allotment in severalty under this act on the reservation where he lives at the time of the removal herein provided for is effected, instead of being removed to and taking such allotment on White Earth Reservation.

Sec. 4. That as soon as the cession and relinquishment of said Indian title has been obtained and approved as aforesaid, it shall be the duty of the Commissioners of the General Land Office to cause the lands so ceded to the United States to be surveyed in the manner provided by law for the survey of public lands, and as soon as practicable after such survey has been made, and the report, field notes, and plats thereof filed in the General Land Office, and duly approved by the Commissioner thereof, the said Secretary of the Interior, upon notice of the completion of such surveys, shall appoint a sufficient number of competent and experienced examiners, in order that the work may be done within a reasonable time, who shall go upon said lands thus surveyed and personally make a careful, complete, and thorough examination of the same by forty-acre lots, for the purpose of ascertaining on which lots or tracts there is standing or growing pine timber, which tracts on which pine timber is standing or growing for the purposes of this

act shall be termed "pine lands," the minutes of such examination to be at the time entered in books provided for that purpose, showing with particularity the amount and quality of all pine timber standing or growing on any lot or tract, the amount of such pine timber to be estimated [fol. 13] by feet in the manner usual in estimating such timber, which estimates and reports of all such examinations shall be filed with the Commissioner of the General Land Office as a part of the permanent records thereof, and thereupon that officer shall cause to be made a list of all such pine lands, describing each forty-acre lot or tract thereof separately, and opposite each such description he shall place the actual cash value of the same, according to his best judgment and information, but such valuation shall not be at a rate of less than three dollars per thousand feet, board measure of the pine timber thereon, and thereupon such lists of lands so appraised shall be transmitted to the Secretary of the Interior for approval, modification, or rejection, as he may deem proper. If the appraisals are rejected as a whole then the Secretary of the Interior shall substitute a new appraisal and the same or original list as approved or modified shall be filed with the Commissioner of the General Land Office as the appraisal of said lands, and as constituting the minimum price for which said lands may be sold, as hereinafter provided, but in no event shall said pine lands be appraised at a rate of less than three dollars per thousand feet board measure of the pine timber thereon. Duplicate lists of said lands as appraised, together with copies of the field-notes, surveys, and minutes of examinations shall be filed and kept in the office of the register of the land office of the district within which said lands may be situated, and copies of said lists with the appraisals shall be furnished to any person desiring the same upon application to the Commissioner of the General [fol. 14] Land Office or to the register of said local land office.

The compensation of the examiners so provided for in this section shall be fixed by the Secretary of the Interior, but in no event shall exceed the sum of six dollars per day for each person so employed, including all expenses.

All other lands acquired from the said Indians on said reservation other than pine lands are for the purposes of this act termed "agricultural lands."



Sec. 5. That after the survey, examination and appraisals of said pine lands has been fully completed they shall be proclaimed as in market and offered for sale in the following manner: The Commissioner of the General Land Office shall cause notices to be inserted once in each week for four successive weeks in one newspaper of general circulation published in Minneapolis, Saint Paul, Duluth and Crookston, Minnesota; Chicago, Illinois; Milwaukee, Wisconsin; Detroit, Michigan; Philadelphia and Williamsport, Pennsylvania; and Boston, Massachusetts, of the sale of said lands at public auction to the highest bidder for cash at the local land office of the district within which said lands are located, said notice to state the time and place and terms of such sale. At such sale said lands shall be offered in Forty-acre parcels, except in case of fractions containing either more or less than forty acres, which shall be sold entire. In no event shall any parcel be sold for a less sum than its appraised value. The residue of such lands remaining unsold after such public offering shall thereafter be subject to private sale for cash at the appraised value of the same upon [fol. 15] application at the local land office.

Sec. 6. That when any of the agricultural lands on said reservation not allotted under this act nor reserved for the future use of said Indians have been surveyed, the Secretary of the Interior shall give thirty days' notice through at least one newspaper published at Saint Paul and Crookston, in the State of Minnesota, and, at the expiration of thirty days, the said agricultural lands so surveyed, shall be disposed of by the United States to actual settlers only under the provisions of the homestead law: Provided, That each settler under and in accordance with the provisions of said homestead laws shall pay to the United States for the land so taken by him the sum of one dollar and twenty-five cents for each and every acre, in five equal annual payments, and shall be entitled to a patent therefor only at the expiration of five years from the date of entry, according to said homestead laws, and after the full payment of said one dollar and twenty-five cents per acre therefor, and due proof of occupancy for said period of five years; and any conveyance of said lands so taken as a homestead, or any contract touching the same, prior to the date of final entry, shall be null and void: Provided, That nothing in this act shall be held to authorize the sale or other disposal under

its provision of any tract upon which there is a subsisting, valid, pre-emption or homestead entry, but any such entry shall be proceeded with under the regulations and decisions in force at the date of its allowance, and if found regular and valid, patents shall issue thereon: Provided, That any [fol. 16] person who has not heretofore had the benefit of the homestead or pre-emption law, and who has failed from any cause to perfect the title to a tract of land heretofore entered by him under either of said laws may make a second homestead entry under the provisions of this act.

Sec. 7. That all money accruing from the disposal of said lands in conformity with the provisions of this act shall, after deducting all the expenses of making the census, of obtaining the cession and relinquishment, of making the removal and allotments, and of completing the surveys and appraisals, in this act provided, be placed in the Treasury of the United States to the credit of all the Chippewa Indians in the State of Minnesota as a permanent fund, which shall draw interest at the rate of five per centum per annum, payable annually for the period of fifty years, after the allotments provided for in this act have been made, and which interest and permanent fund shall be expended for the benefit of said Indians in manner following: One-half of said interest shall, during the said period of fifty years, except in the cases hereinafter otherwise provided, be annually paid in cash in equal shares to the heads of families and guardians of orphan minors for their use; and one-fourth of said interest shall, during the same period and with the like exception, be annually paid in cash in equal shares per capita to all other classes of said Indians; and the remaining one-fourth of said interest shall, during the said period of fifty years, under the direction of the Secretary of the Interior, be devoted exclusively to the establishment and maintenance of a system of free schools [fol. 17] among said Indians, in their midst and for their benefit; and at the expiration of the said fifty years, the said permanent fund shall be divided and paid to all of said Chippewa Indians and their issue then living, in cash, in equal shares: Provided, that Congress may, in its discretion, from time to time, during the said period of fifty years, appropriate, for the purpose of promoting civilization and self-support among the said Indians, a portion of said principal sum, not exceeding five per centum thereof.



The United States shall, for the benefit of said Indians, advance to them as such interest as aforesaid the sum of ninety thousand dollars annually, counting from the time when the removal and allotments provided for in this act shall have been made, until such time as said permanent fund, exclusive of the deductions hereinbefore provided for, shall equal or exceed the sum of three million dollars, less any actual interest that may in the meantime accrue from accumulations of said permanent fund; the payments of such interest to be made yearly in advance, and, in the discretion of the Secretary of the Interior, may, as to three-fourths thereof, during the first five years be expended in procuring live-stock, teams, farming implements, and seed for such of the Indians to the extent of their shares as are fit and desire to engage in farming, but as to the rest, in cash; and whenever said permanent fund shall exceed the sum of three million dollars the United States shall be fully reimbursed out of such excess, for all the advances of interest made as herein contemplated and other expenses hereunder.

[fol. 18] Sec. 8. That the sum of one hundred and fifty thousand dollars is hereby appropriated, or so much thereof as may be necessary, out of any money in the Treasury not otherwise appropriated, to pay for procuring the cession and relinquishment, making the census, surveys, appraisals, removal and allotments, and the first annual payment of interest herein contemplated and provided for, which money shall be expended under the direction of the Secretary of the Interior in conformity with the provisions of this act. A detailed statement of which expenses, except the interest aforesaid, shall be reported to Congress when the expenditures shall be completed.

Approved, January 14, 1889."

3. Within the time prescribed in Section 1 of said act, three commissioners were appointed, who duly qualified and entered into agreements with all of the different bands or tribes of said Indians in Minnesota for the cessions and relinquishments provided for in said act, which agreements were drawn, procured, assented to and executed, all in strict conformity with the provisions of said act, the said act being made a part of each agreement. The agreements duly executed by the commissioners and the Indians, including

such cessions and relinquishments, were, on March 4, 1890, approved by the President, as provided in said act, and thereupon became effective.

4. Plaintiffs aver that by said agreements so entered into pursuant to said Act there was an immediate and complete [fol. 19] cession of all the right, title and interest of all said bands or tribes of Indians in and to all lands and timber embraced within all said reservations occupied by said bands or tribes, and a complete cession and declaration of trust as to all the right, title and interest of defendant United States in and to all said lands and timber, all upon the specific trusts set forth and declared in said trust agreements and not otherwise. Said agreements did not arise out of or result from the exercise by defendant United States of its plenary power over the property of said Indians, but defendant dealt with said Indians by contract, evidenced by said agreements, and said agreements when executed and approved as aforesaid became binding in all respects upon said Indians and defendant.

And plaintiffs aver that the settlers of said trust were the various bands and tribes of Chippewa Indians in Minnesota and defendant United States, parties to said trust agreements; that the trustee of said trust was and is the defendant United States, which by said trust agreements accepted said trust, and became and ever since has been obligated to carry out said trust agreements according to their plain tenor, and not otherwise, and without compensation or reimbursement for so doing save as in said trust agreements expressly provided; that by the express terms of said trust agreements defendant, as trustee, agreed to, and did assume, the duty and obligation of making the allotments and selling and disposing of the ceded lands and timber thereon in manner and form as in said trust agreements provided, [fol. 20] and after defraying the actual and necessary expenses of "making the census, of obtaining the cession and relinquishment, of making the removal and allotments, and of completing the surveys and appraisals" as expressly specified in said trust agreements, and no other, to deposit the net proceeds in the Treasury of the United States to the exclusive credit and for the exclusive use and benefit of a well-defined class of individuals, embracing from time to time all the living issue of all those persons who were members of said bands or tribes at the time said trust agree-

ments became effective, and the surviving members of said bands or tribes, said designated class being varied from time to time during the trust period only by birth and deaths, and only the members of said class in being at the time each annual payment of the interest money was and may hereafter be made, and who are in being at the expiration of the trust period when the corpus of the trust is distributed, as expressly provided in said trust agreements, being entitled to share therein, and which said class is described in said trust agreements as "all the Chippewa Indians in Minnesota" and in said jurisdictional act above set forth (Act of May 14, 1926, 44 Stat. 355) as "The Chippewa Indians of Minnesota," and is identical with plaintiffs herein.

Plaintiffs further aver that from the inception of said trust the equitable rights and interest of said individual beneficiaries of said trust to receive shares of the interest annually during the continuance thereof, and to equal dis-[fol. 21] tributive shares of the permanent fund upon termination of said trust were and have continued vested, personal and individual interests and rights, not subject to be impaired, changed or modified by defendant, the rights of each individual member of said class ceasing and terminating only upon his or her death prior to the final distribution, and then only as to future payments and distributions.

5. Defendant United States, as such trustee, proceeded with the disposal of said ceded lands and the timber thereon, and, in attempted compliance with that portion of said agreements (Section 7 of said Act of January 14, 1889 (25 Stat. 642), which required that the money accruing from such disposal be placed in the Treasury of the United States to the credit of said class as a permanent fund, defendant established and set up in its said treasury a permanent fund which was designated on defendant's books of account, and is hereinafter referred to as "Chippewas in Minnesota Fund," in which, from time to time, it duly deposited and placed moneys accruing from the disposal of said lands and timbers, and which fund is the interest bearing "permanent fund" referred to in said trust agreements and provided for by Section 7 of said act. In further attempted compliance with its duties as such trustee, defendant set up and established a non-interest bearing fund designated in defendant's books of account and hereinafter referred to as "Interest on Chippewas in Minnesota Fund," in which fund

defendant deposited various amounts from time to time as [fol. 22] and for the interest accruing at the rate of five per cent per annum on the amounts from time to time remaining in said "permanent fund" above described.

6. By said trust agreements, and particularly by that part thereof embraced in Section 7 of said Act of January 14, 1889 (25 Stat. 642), the defendant, United States, was authorized and agreed to advance to the beneficiaries of said trust, as advance interest on said principal sum, the sum of \$90,000.00 annually, less any actual interest which might in the meantime accrue on accumulations of said permanent fund, such advance to continue until such time as said permanent fund, exclusive of the deductions in said trust agreement provided for, should equal or exceed the sum of \$3,000,000.00. The first appropriation for said purpose was embraced in Section 8 of said act of January 14, 1889, supra, and pursuant to said appropriation and from moneys made available by subsequent annual appropriating acts of Congress passed in each of the years 1891 to 1910, both inclusive, and each appropriating \$90,000.00 for such advance interest, the defendant appropriated and expended out of its funds, as such advance interest, in the manner and for the purposes hereinafter more specifically set forth, during the fiscal years 1891 to 1912, inclusive, the total sum of \$1,861,289.28.

7. On May 16, 1911, the defendant United States took and withdrew from said "Chippewas in Minnesota Fund," as reimbursement for the amounts so expended as advance interest as aforesaid, the sum of \$896,246.93, and from said [fol. 23] "Interest on Chippewas in Minnesota Fund" defendant on said date took as such reimbursement the sum of \$874,898.00, and on June 11, 1912, defendant further took from said interest fund as such reimbursement the sum of \$89,039.00, making a total withdrawal from said funds of these plaintiffs, on account of reimbursement for advance interest as aforesaid, the sum of \$1,860,183.93.

8. Defendant's duty to make such payments of advance interest, and its right to reimburse from said permanent fund therefor, was limited by the express language of said trust agreements to an amount in any one year equal to the difference between the sum of \$90,000.00, and the actual interest accruing on accumulations of said permanent fund during such year, it being the intent of said provisions that

while the beneficiaries of said trust should receive at least \$90,000.00 per year as interest payments, the same should be paid out of actual interest accruing to extent of such accruals, and that only the deficiency, if any, was to be advanced by the defendant United States, and reimbursed to it out of said permanent fund.

During the fiscal years ending June 30, 1891, to June 30, 1896, inclusive, defendant disbursed in cash payments to the Indians, as provided in said act, advance interest aggregating \$468,368.40. During said years no interest accrued on said permanent fund and defendant was lawfully entitled to its said reimbursement out of said principal fund for said amount. During the eight fiscal years ending on June 30th of each of the years 1897 to 1904, both inclusive, defendants [fol. 24] disbursed in cash payments of advance interest to said Indians, as provided in said agreements, the total sum of \$492,939.23. During said years the first proceeds of the disposal of the trust property were paid into the Treasury of the United States, and in each of said years interest (amounting to less than \$90,000 for any one year) accrued on said accumulations of said permanent fund, the total actual interest thus accruing during said fiscal years being the sum of \$334,898.00; all as more fully appears by warrant No. 29, dated January 13, 1904, covering into "Interest on Chippewas in Minnesota fund" the sum of \$293,508.71, expressly for "interest at 5 per cent per annum on receipts from the disposal of Chippewa Indian lands under said Act of January 14, 1889, from September 30, 1896, the date when the first deposits were covered into the treasury, to December 31, 1903," and warrant No. 7, dated July 1, 1904, covering into said interest fund the sum of \$41,389.29, as additional interest on such receipts to the end of the fiscal year ending June 30, 1904.

Plaintiffs further allege that during each and every fiscal year since the year ending June 30, 1904, the interest actually accruing upon said permanent fund in each year and the amount actually credited thereto as such interest has substantially exceeded \$90,000 per year, and that in consequence no reimbursement out of principal was authorized on account of any other or subsequent payment of cash or other expenditure as advance interest.

[fol. 25] "In consequence, plaintiffs aver and allege that the total amount which defendant was under said Act lawfully entitled to reimburse itself out of said 'Chippewas in



Minnesota Fund' on account of advanced interest paid or disbursed by it was the sum of \$664,235.72 in accordance with following calculation to wit:

Fiscal Years Ending June 30	Advanced and Disbursed as Interest	Interest Accrued	Reimbursable Balance
1891-1896, incl.....	\$468,357.40	none	\$468,357.40
1897-1904, incl.....	530,776.32	\$334,898.00	195,678.32
Total.....	\$999,133.72	\$334,898.00	\$664,235.72

"In consequence plaintiffs aver that in taking and withdrawing from said 'Chippewas of Minnesota Fund' the sum of \$896,246.93 on May 16, 1911 as reimbursement for advanced interest under said Act defendant exceeded the amount to which it was lawfully entitled by the sum of \$232,011.21 and then and there wrongfully depleted said principal sum to the damage of plaintiffs by said amount."

9. In the year 1890 and in each of the fiscal years ending June 30th of each of the years 1892 to 1910, inclusive, the Congress of the United States appropriated various amounts out of the public moneys of the United States under appropriations which expressly provided that the same were: "To enable the Secretary of the Interior to carry out the act entitled 'An Act for the relief and civilization of the Chippewa Indians in the State of Minnesota and for other purposes,' approved January fourteenth, eighteen hundred eighty-nine." Said act therein referred to was the act of said date above referred to and set forth and embodied in said agreements. The total amounts so made available for said purposes under all of said appropriations was the sum of \$2,350,559.00, of which amount so appropriated the officers of defendant expended to and including the end of the fiscal year 1913 the sum of \$2,338,625.32. On May 16, 1911, defendant withdrew and took from said "Chippewas in Minnesota Fund" and converted to its own use, as reimbursement for the amounts so expended as aforesaid, the sum of \$2,196,036.63; and on June 11, 1912, defendant similarly and for the same purpose took and withdrew from said fund, as such reimbursement for such expenditures, the further sum of \$139,550.59, and on May 26, 1913, similarly withdrew as such reimbursement the further sum of \$3,241.27, making a total reimbursement to the defendant United States, out of said "Chippewas in Min-



nesota Fund," on account of amounts expended under the appropriations last above described, of \$2,338,828.49, and plaintiffs aver that by reason of the reimbursement aforesaid defendant has taken and withdrawn from the said "Chippewas in Minnesota Fund," as its reimbursement for moneys expended under the appropriations to enable the Secretary of the Interior to carry out said act above described, \$203.17 more than the total amount expended by it under said appropriations, said excess reimbursement constituting part of the reimbursement of May 26, 1913, above set forth, which said reimbursement then and there wrong-[fol. 27] fully depleted said principal sum, to the damage of plaintiffs in said amount.

10. Plaintiffs further aver that of said total sum of \$2,338,625.32 so appropriated and expended by the defendant, United States, and for which it took reimbursement from the said "Chippewas in Minnesota Fund" as aforesaid, a large portion was expended for such purpose that defendant, United States, was wholly without right and authority in so reimbursing itself therefor. Plaintiffs aver that under said trust agreements, and under said Act of January 14, 1889 (25 Stat. 642), embodied therein, the defendant, United States, was without right or authority to reimburse itself from said "permanent fund" save for such items of expenditures made by it in carrying out said trust agreements as to which reimbursement was expressly authorized by the terms thereof, to-wit, the expenses of making the census and of obtaining the cessions and relinquishments, and of making the removals and allotments, and of completing the surveys and appraisals provided for and contemplated in said Act and agreements, and was wholly without other authority to expend said "permanent fund" or to withdraw moneys therefrom or to impair the same in any manner, save under the provision of said trust agreements and of Section 7 of said Act, hereinafter more specifically set forth, authorizing the appropriation therefrom by Congress of not more than five per cent thereof "for the purpose of promoting civilization and self-support among the said Indians." The sole and exclusive provision and authority for any ex-[fol. 28] penditure of either principal or interest of said trust funds for education was the provision contained in said Section 7 of said Act as embodied in said agreements for the expenditure of one-fourth of the interest annually

accruing on said "permanent fund" for a system of free schools among the Indians. Plaintiffs aver that notwithstanding the said plain meaning and intent of the said Act and agreements and unmindful of the same, the defendant, United States, unlawfully and without authority reimbursed itself by said withdrawal of \$2,196,036.63 made on May 16, 1911, as aforesaid, for expenditures made by it from public funds for the following uses and purposes which plaintiffs aver to have been wholly unauthorized under said trust agreements and not reimbursable out of said principal fund, to-wit: Expenditures for education aggregating \$1,033,879.01; expenditures for roads in the sum of \$37,714.77; for bridges \$3,972.14; for clothing \$3,475.18; for provisions and rations \$69,275.42; agricultural implements and equipment \$29,895.16; for work and stock animals \$34,841.80; for feed and care of livestock \$23,173.78; for hardware, glass, oils and paints \$32,378.62; for medical attention \$102,400.90; for Indian houses \$170,019.30; for household equipment \$14,424.69; for fuel and light \$29,672.84; for hospitals and equipment \$54.29; for pay of agency mechanics \$100,387.58; for miscellaneous agency employees \$184,029.22; for agricultural aid \$26,031.89; for miscellaneous expenses of operating Indian agencies in Minnesota \$8,227.06; for the erection and repair of various Indian agency buildings in Minnesota \$15,473.47; for saw and grist mills \$18,456.96; for miscellaneous building materials \$10,504.48; for pay of Indian farmers \$26,785.93; for the burial of Indians \$591.79; for the care of indigent Indians \$16,479.65; for telephone lines \$601.89; for boats and docks \$11,189.56; for per capita payments \$25.20; for pay of agents and subagents \$1,350.00; for pay and expenses of Indian police \$86.82; and for the holding of annual celebrations of the White Earth Band \$5,061.97. The aggregate of all of said items so unlawfully expended and reimbursed from the said permanent fund is the sum of \$2,010,461.37. None of said expenditures were made pursuant to or from moneys appropriated by Congress "for the purpose of promoting civilization and self-support among the said Indians," nor were the same made out of or as any percentage of the said "permanent fund," said expenditures having been made from public moneys and prior to the establishment of said "permanent fund." The benefits of said expenditures were not distributed per capita among the Indians, and of necessity benefited but a small portion of the beneficiaries of said trust, and bore no rela-

tion to the carrying out of said Act and agreements or any operation or expenditure of the defendant in so doing. And plaintiffs allege that by its said taking and diversion from the said "permanent fund" of said sum of \$2,010,461.37, as reimbursement for said expenditures above described, defendant then and there, to-wit, on May 16, 1911, wrongfully and unlawfully depleted said "permanent fund" to the damage of these plaintiffs in said amount.

[fol. 30] 11. Plaintiffs further aver that on or about May 16, 1911, defendant took from said "Chippewas in Minnesota Fund," being the "permanent fund" provided for by said agreements, the following amounts to reimburse the defendant for expenditures made for the following purposes, to-wit: for a drainage survey of ceded land \$30,453.79; for an Indian school at Leach Lake, Minnesota, \$19,782.50; for an Indian school at Red Lake, Minnesota, \$35,000.00; for various Indian schools in Minnesota \$17,974.54, the total of said amounts so reimbursed being \$103,210.83. Defendant further took from said "Chippewas in Minnesota Fund" on the following dates, as reimbursements for amounts theretofore expended by it, the following amounts expended for the following purposes, to-wit: On June 15, 1915, defendant took as reimbursement for moneys theretofore expended for a drainage survey of lands ceded under said Act and agreements the sum of \$3,234.88; and on March 28, 1927, defendant took from said fund as reimbursements for amounts theretofore expended by it for education the sum of \$1,000.00. Plaintiffs allege that none of the amounts so expended and reimbursed out of principal of said "permanent fund," as aforesaid, was expended for or in connection with the carrying out of all or any part of said Act of January 14, 1889 (25 Stat. 642), or the agreements and cessions entered into pursuant thereto, nor were the same payable or reimbursable from the principal of said "permanent fund," nor were the same made pursuant to any appropriation by Congress of any part of said permanent fund "for the purpose of promoting civilization and self-support among said [fol. 31] Indians"; and the plaintiffs aver that by each of said withdrawals and reimbursements the said "permanent fund" was wrongfully reduced by the amount thereof to the damage of plaintiffs herein, beneficiaries of said trust.

12. Plaintiffs aver that, after the reimbursements authorized by said Act, the only lawful power reserved to

defendant to make disbursements or deductions from said "Chippewas in Minnesota Fund," being the permanent fund referred to in said agreements, were such lawful disbursements of principal as might be made under the following proviso of said Section 7 of said Act of January 14, 1889, embodied in said agreements, to-wit:

"Provided; that Congress may, in its discretion, from time to time during said fifty years, appropriate for the purpose of promoting civilization and self-support among said Indians a portion of said principal sum not exceeding five per centum thereof."

Said "Chippewas in Minnesota Fund" referred to in said proviso as "said principal sum" is elsewhere named and designated in said Act and agreements as a "permanent fund," and plaintiffs aver that by said agreements and by the designation of said principal fund as a permanent fund, as aforesaid, and by said express reservation of said limited power of appropriation from said permanent fund set forth in said proviso above quoted, defendant United States promised and agreed that said permanent fund should not [fol. 32] be subject to the general discretionary control of Congress; and that all discretionary power of the defendant, United States, or its Congress to appropriate or use any portion of said permanent fund either for the benefit of said Indians or otherwise should be restricted to the express power set forth in said quoted proviso.

Plaintiffs further aver that by said agreements it was intended and agreed that said principal fund should in fact be and remain as a "permanent fund" throughout the fifty year trust period therein provided for; that the discretionary power so reserved by said quoted proviso did not authorize Congress from time to time and as often as it should see fit to make repeated separate appropriations each aggregating five per cent of said permanent fund (thus enabling Congress to wholly dissipate the same within a short period of time), but in fact limited the total of all amounts so authorized to be diverted and expended during the entire life of said trust to a total amount not exceeding five per cent of the total of all amounts credited to said permanent fund less the deductions and reimbursements for expenses incurred in carrying out said Act and agreements as expressly authorized thereby.

Plaintiffs aver that the total of all amounts credited to said "Chippewas in Minnesota Fund" is the sum of



\$17,662,325.70, and that the total of all such lawful deductions and reimbursements for expenses incurred is the sum of \$1,853,793.59, leaving a balance of \$15,808,528.11, and that the total amount authorized to be appropriated by Congress out of said permanent fund by said proviso above quoted is [fol. 33] five per cent of said last named sum, or a total for all such appropriations during the entire life of the trust of \$790,426.40.

13. Plaintiffs aver that, notwithstanding the express provisions of said trust agreements and the express limitations therein contained upon the expenditure of said principal fund and the authority of defendant and its Congress in regard thereto, defendant, prior to June 30, 1927, expended and disbursed from said permanent fund, under appropriations of Congress purporting to be "for the purpose of promoting civilization and self-support among said Indians," the total sum of \$2,526,267.74.

Plaintiffs allege that all disbursements from said permanent fund for promoting self-support and civilization were wholly unlawful and a violation of said trust to the extent of all amounts so expended in excess of and after the expenditure of said sum of \$790,426.40, and that the balance thereafter so unlawfully appropriated and disbursed was the sum of \$1,735,841.34. Said Acts appropriating said amounts, the fiscal year of the expenditures under each Act, the amount appropriated by each Act and the total amount expended from such appropriations are as set forth in the following tabulation, to-wit:

[fol. 34] Acts.	Stats.	Fiscal Year	Appropriated	Expended.
March 3, 1911	36-1065	1912	\$168,500.00	\$142,211.93
Aug. 24, 1912	37- 525	1913	166,000.00	145,675.60
June 30, 1913	38- 88	1914	170,000.00	161,598.19
Aug. 1, 1914	38- 590	1915	266,000.00	263,432.63
March 4, 1915	38-1228	1916	161,000.00	155,393.98
May 18, 1916	39- 134	1917	197,250.00	181,729.51
March 2, 1917	39- 977	1918	197,000.00	189,727.25
May 25, 1918	40- 572	1919	186,000.00	182,893.16
June 30, 1919	41- 13	1920	193,000.00	176,983.12
Feb. 14, 1920	41- 419	1921	71,000.00	66,178.82
March 3, 1921	41-1235	1922	105,200.00	98,340.32
May 24, 1922	42- 569	1923	141,570.00	126,333.63
Jan. 14, 1923	42-1190	1924	145,000.00	133,168.54
April 2, 1924	43- 142	1925	190,000.00	172,242.55
June 5, 1924	43- 407		23,150.00	
March 4, 1925	43-1329	1926	185,330.00	159,715.72
" 3, 1925	43-1158			
	1162			
May 10, 1926	44- 471	1927	188,500.00	170,642.79
	475			

Total..... \$2,754,500.00 \$2,526,267.74

Plaintiffs allege that by said wrongful appropriations and expenditures the said permanent fund was there-  
 fully and wrongfully reduced to the extent of said  
 \$1,735,841.34, to the damage of the beneficiaries  
 trust, plaintiffs, herein, and plaintiffs pray judgment  
 against defendant for said sum, together with interest at  
 rate of 5 per cent per annum on each and all items so wrong-  
 fully expended and disbursed from said fund after the dis-  
 bursement therefrom of said sum of \$790,426.40 for said  
 purposes, from the end of the fiscal year in which such dis-  
 bursement was made, as indicated by the foregoing table.

14. Plaintiffs further aver that between June 30, 1904,  
 and June 30, 1927, defendant wrongfully and unlawfully  
 took and disbursed from said "Chippewas in Minnesota  
 Fund" without authority of any act of its Congress ap-  
 [fol. 35] propriating the same for the promotion of civiliza-  
 tion and self-support, the further sum of \$547,421.25. The  
 exact dates of the taking of said moneys and the exact uses  
 and purposes to which the same were put are to plaintiffs  
 unknown, but plaintiffs allege that by said taking said per-  
 manent fund was depleted to the extent thereof, to the dam-  
 age of the beneficiaries of said trust, plaintiffs herein to said  
 amount.

15. Plaintiffs further aver that included in the said sum  
 of \$2,526,267.74, disbursed under appropriations purport-  
 ing to be for the promotion of civilization and self-support  
 among said Indians, and said sum of \$547,421.25, disbursed  
 as alleged in paragraph 14 hereof, were the following  
 amounts expended by the defendant for the following pur-  
 poses, each and all of which plaintiffs allege to have been  
 contrary to the express terms of said trust agreements and  
 not lawfully chargeable to said principal fund, either as in-  
 tended or calculated to promote civilization and self-support  
 among the Indians, or otherwise, to-wit: For education the  
 sum of \$439,592.00; for roads in the ceded lands \$67,692.52;  
 for bridges \$4,432.42; for donations to the Minnesota Pub-  
 lic School System on account of the attendance thereat of  
 certain children of the Chippewa Indians of Minnesota  
 \$140,854.85; for donations to the Minnesota Public School  
 System to be used by it in the purchase of school grounds  
 and the erection of school buildings constituting a part of  
 said Public School System and the property of said State  
 \$43,662.96; for the purchase of lands for allotments to indi-



[fol. 36] vidual Indians \$40,017.31; for clothing distributed to various indigent Indians \$4,981.01; for provisions and rations distributed to various individuals \$100,650.41; for medical attention to various individuals \$492,224.95; for Indian houses erected for various individuals \$73,533.47; for household equipment \$10,192.85; for fuel and light \$77,093.54; for hospitals and equipment available to such individuals as might require medical attention \$114,822.61; for pay of mechanics connected with Indian Agencies in Minnesota \$86,975.66; for miscellaneous Indian Agency employes \$358,383.63; for the transportation of supplies for various individuals \$36,924.26; for miscellaneous expenses of defendant's Indian Agencies in Minnesota \$44,453.10; for the erection and repair of various buildings and structures including sewer and water systems, etc., of defendant's Indian Agencies in Minnesota \$10,869.61; for council and delegations \$63,411.67; for pay of Indian police \$342.40; for the burial of Indians \$2,268.72; for the annual celebration of Indians resident on the White Earth Reservation \$8,381.10; for the care of indigent Indians \$65,130.89; for the erection and maintenance of telephone lines \$13,567.76; for a payment to certain former chiefs of the Mille Lac Band of Chippewa Indians \$11,000.00; and for opening Indian Reservations \$33.49.

Plaintiffs allege that the State of Minnesota since long prior to 1889 maintained a free public school system co-extensive with the boundaries of said state; that under the Constitution of said state it is expressly made the duty of the legislature thereof to establish and maintain a general and uniform system of public schools and to make such pro-[fol. 37] visions by taxation or otherwise as will secure a thorough and efficient system of public schools in each township in the state (Secs. 1, 2 and 3 Article VIII, Constitution of Minnesota); that in and by the laws of said state it is provided that all schools supported in whole or in part by the state shall be public schools and admission to and tuition therein shall be free to all persons between the ages of 5 and 21 years in the district in which the pupil resides (General Statutes of Minnesota for 1923, Sec. 2741). Under said laws all children of school age in said state, including Indian children, have at all times had access to and been entitled to admission to the public schools of said state in the school district in which such children resided, without any charge

therefor, and the parent and guardian of every such child between the ages of 8 and 16 years is and has been during all of said time required by the laws of said state to keep such child or children regularly in school during the entire school year (General Statutes of Minnesota for 1923 Sec. 3080); and plaintiffs allege that said payments to the Minnesota Public School System resulted in no benefit whatsoever to plaintiffs, were pure gifts or gratuities to said state and were wholly invalid and unauthorized by said Act and agreements.

Plaintiffs allege that said sum of \$40,017.31 was wrongfully expended for the purchase of lands for the purpose of making allotments to Indians to whom allotments should have been made from the ceded lands before entry thereon was permitted; said lands were purchased at a price of \$20.00 per acre, after prior disposal under said Act and [fol. 38] agreements at the rate of \$1.25 per acre.

The amounts above set forth as expended for clothing, provisions and rations, medical attention, Indian houses, household equipment, fuel and light, hospitals and equipment, burial of Indians and care of indigent Indians were not intended or calculated to promote civilization and self-support among the Chippewa Indians of Minnesota and were not distributed per capita or otherwise to said Chippewa Indians as a class, but were expended for certain needy and ailing individuals for the relief of individual distress, said items constituting no proper charge against said permanent fund. Plaintiffs further allege that said amounts expended for hospitals and medical attention were in fact expended pursuant to and as part of a general policy of the Government in the performance of its duty as guardian of its Indian wards throughout the United States in promoting health and prevention of disease among the Indians and constituted normal expenditures by said United States as such guardian and not authorized disbursements from nor proper charges against said principal fund under said Act and agreements.

Plaintiffs further aver that the items above set forth for the pay of mechanics, for miscellaneous employees of defendant's Indian Agency service in Minnesota, for miscellaneous agency expenses and for agency buildings, equipment and repairs were expended in the maintenance of defendant's Indian service in the State of Minnesota and were

not necessitated or caused by or incurred in the carrying out [fol. 39] of said Act of January 14, 1889, or said agreements entered into pursuant thereto. Long prior to said Act of January 14, 1889, and for more than twenty years thereafter, the defendant United States maintained in the State of Minnesota, as in other states, its said Indian service for the purpose of discharging its duty as guardian of the Indians, the maintenance of order among said Indians, the exclusion of liquor from the Indian country, the administration of other and prior treaties with the Indians and the maintenance of such health and other service as in its capacity as such guardian it saw fit to administer, all at its own cost and expense. Plaintiffs allege that said Act of January 14, 1889, and the agreements entered into pursuant thereto, did not provide for nor contemplate that in consequence thereof the defendant, United States, should be relieved of the expense of such operations nor that it should thereafter be entitled to charge to the said funds of plaintiffs any part of its said governmental expense. Plaintiffs allege that said items last above described are items incurred as part of such governmental and administrative expense and as such are wholly unauthorized and unjustified charges against plaintiffs' trust funds.

The total of all of said items above specifically set forth as wrongfully and unlawfully disbursed from and charged to the said permanent fund is the sum of \$2,311,493.19. Plaintiffs allege that said sum was wrongfully and unlawfully taken from and charged to said permanent fund at the times said disbursements were made, wrongfully depleting [fol. 40] said permanent fund to the damage of these plaintiffs, beneficiaries of said trust, in said amount.

16. Plaintiffs further aver that during the fiscal years ending on June 30th in each of the years set forth in the following tabulation, defendant, United States, unmindful of its duties and obligations as trustee under said agreements and in utter disregard thereof, wrongfully and unlawfully took and disbursed from said permanent "Chippewas in Minnesota Fund" the respective amounts in said tabulation set forth and used and disbursed the same in making cash payments of principal per capita to persons then in being and claimed by it to have been at the time of such payments beneficiaries of said trust:

Fiscal year ending June 30th	Amount distributed
1917	\$1,490,663.40
1918	7,107.22
1919	2,167.27
1920	4,692.80
1921	2,873.20
1922	1,270,666.39
1923	5,491.80
1924	1,364,322.10
1925	774,761.91
1926	768,898.11
1927	3,647.74

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Total principal disbursed in cash \$5,684,341.60

Plaintiffs allege that such cash disbursements of said principal permanent fund were wholly unauthorized and wholly unlawful under said Act and agreements; that the beneficiaries of said trust constitute a class changing from time to time by reason of births into said class and deaths of members thereof; that none of said class was entitled or [fol. 41] had any right by reason of membership in said class to have or receive any such payments of principal during the continuance of said trust, nor to assent thereto, either for himself or in any other capacity or for future members of said class, nor to ever have or receive any part of or payment from said permanent fund, save upon final distribution of said trust at the end of the fifty year trust period and then only if such individual member of said class survived to the end of said trust period. By each such payment to each such individual and the consequent wrongful depletion of the permanent fund aforesaid, the interest thereafter available for school purposes and for distribution and the shares of all remaining members of said class and the shares and interest of all persons later born into said class, were unlawfully reduced. Plaintiffs further aver that, during the thirteen years since the first of said cash payments of principal, more than two thousand persons who received more than \$750,000.00 of said cash payments have died and their right to receive a share in said permanent fund upon final distribution has thereby terminated,

and that prior to the termination of the trust substantially all of them will be dead.

Plaintiffs further aver that among the payments of shares of principal aforesaid during each of the fiscal years above described, defendant paid out and disbursed large amounts of said principal to persons who were not enrolled on the census provided for in Section 1 of said Act of January 14, 1889, nor subsequently enrolled by any lawful authority nor [fol. 42] issue of any persons lawfully enrolled under said Act, and neither lawful beneficiaries of said trust, nor members of said designated class, plaintiffs herein. Plaintiffs have not exact knowledge as to the total amount of such unlawful payments of principal to said persons not members of said class, but, upon information and belief, alleged that the amount of such unlawful cash payments to said persons not members of said class exceeded \$350,000.00. Plaintiffs aver that by all said unlawful distributions of said permanent fund in cash the said permanent fund was wrongfully and unlawfully reduced to the extent of said sum of \$5,684,341.60, to the damage of plaintiffs, beneficiaries of said trust, in said amount on the dates when such unlawful distributions were made.

17. Plaintiffs further allege that during the fiscal years ending on June 30th in each of the years 1911 to 1927, inclusive, the defendant expended and disbursed from said "interest on Chippewas in Minnesota Fund" the total sum of \$5,720,823.54. Of said sum, the amount of \$4,367,302.61 was disbursed in per capita cash payments to persons claimed by defendant to be members of the class, beneficiaries of said trust, plaintiffs herein. During said period, defendant further expended from said interest fund for education, i. e., in the pay of school superintendents, teachers, miscellaneous school employees, school buildings and grounds, provisions, clothing, transportation, fuel and light, medical attention, live stock and the care thereof, manual training supplies, school farm, hardware, glass, oils and [fol. 43] paints, and travel expenses of school employees, the total sum of \$1,131,027.08.

Plaintiffs aver that under the express provision of said agreements the only lawful and proper disbursement of said interest fund was in per capita cash payments to the beneficiaries of said trust from time to time, and in the use of one-fourth of said interest under the direction of the Secre-



tary of the Interior for the establishment and maintenance of a system of free schools among said Indians, in their midst, and for their benefit. Notwithstanding said limitation, defendant, during the fiscal years above set forth, unlawfully and wrongfully expended from said interest fund, for purposes other than per capita cash payments, and not for the establishment or maintenance of such system of free schools, the sum of \$228,493.85, and plaintiffs allege and claim that said expenditure of said additional amounts was wholly unlawful and a wrongful disbursement of the funds of plaintiffs. Included in said amounts so wrongfully disbursed as aforesaid was the sum of \$201,780.81, wrongfully and unlawfully taken from said "Interest on Chippewas in Minnesota Fund" and paid over by said defendant, United States, to various contract schools and particularly to St. Mary's Mission Boarding School at Red Lake, Minnesota, and St. Benedict's Mission Boarding School at White Earth, Minnesota, in payment for the support and education of various Indian children. Said contract schools were sectarian schools and formed no part of any system of free schools as authorized by said trust, and said expenditure in consequence was not authorized or proper under said Act and the [fol. 44] agreements entered into pursuant thereto. The balance of said sum as unlawfully taken and disbursed from said "Interest on Chippewas in Minnesota Fund" included also the following items, expended for the following purposes, none of which were for, or in connection with, any system of free schools among said Indians, to-wit: For roads \$15.00, for payments to the Minnesota Public School System for the education of various Indian children \$143.91; for expenses in the care and sale of timber \$225.00; for provisions and rations \$110.98; for agricultural equipment \$223.46; for work and stock animals \$550.00; for feed and care of livestock \$1,278.17; for hardware, glass, oils and paints \$4,182.31; for medical attention \$17,567.54; for household equipment \$1.80; for fuel and light \$215.91; for hospitals and equipment \$55.37; for miscellaneous agency employees \$510.00; for transportation of supplies \$356.67; for miscellaneous Indian agency expenses in Minnesota and for agency buildings and repairs therein \$697.28; for saw and grist mills \$22.50; for miscellaneous building materials \$17.50; for erection and maintenance of telephone lines \$206.33; for boats, docks, etc. \$333.31.

Plaintiffs allege that by said wrongful disbursements of said amounts not expended for per capita cash payments or for the maintenance of a system of free schools among said Indians, to-wit, said amount of \$228,493.85, wrongfully depleted and reduced the "Interest on Chippewas in Minnesota Fund" by the amount of such disbursements, and that plaintiffs as beneficiaries of said trust are entitled to have said amount reimbursed to said "Interest on Chippewas in [fol. 45] Minnesota Fund" and distributed and disbursed in accordance with said agreements.

18. Plaintiffs further allege that, out of said sum of \$4,367,302.61 disbursed by defendant in per capita cash payments from said "Interest on Chippewas in Minnesota Fund" as aforesaid, defendant, during each of said years above and in the preceding paragraphs set forth, paid out and disbursed large amounts of said interest to persons who were not on the census provided for by Section 1 of said Act, nor issue of any person lawfully enrolled under said Act and agreements and neither lawful beneficiaries of said trust nor members of said designated class, plaintiffs herein.

Plaintiffs have not exact information as to the total amount of such unlawful payments to said persons not entitled thereto but, on information and belief, allege that said amount so unlawfully disbursed was in excess of the sum of \$150,000.00, and the plaintiffs aver that, as beneficiaries of said trust, plaintiffs are entitled to the judgment of this court that said amount so wrongfully paid out and disbursed therefrom be by the defendant returned to said "Interest on Chippewas in Minnesota" for distribution and disbursement in accordance with the provisions of said acts and agreements.

Wherefore Plaintiffs pray judgment against defendant:

1. For the sum of \$42,776.53, together with interest thereon at the rate of 5 per cent per annum from May 15, [fol. 46] 1911, to be restored to such permanent fund on account of excess reimbursement from said permanent fund as set forth in paragraph 8 hereof

2. For the further sum of \$203.17, together with interest thereon at the rate of 5 per cent per annum from May 26, 1913, to be restored to said permanent fund on account of excess reimbursement therefrom as set forth in paragraph 9 hereof.

3. For the further sum of \$2,010,461.37, together with interest thereon at the rate of 5 per cent per annum from May 16, 1911, to be restored to said permanent fund on account of the reimbursement for wrongful and unauthorized expenditure as set forth in paragraph numbered 10 hereof.

4. For the further sum of \$103,210.83, together with interest thereon at the rate of 5 per cent per annum from May 16, 1911, to be restored to said permanent fund on account of the reimbursement on said date from said permanent fund of expenditures for drainage surveys for an Indian school at Leach Lake, for an Indian school at Red Lake and for various Indian schools in Minnesota, as set forth in paragraph numbered 11 hereof.

5. For the further sum of \$4,234.88, together with interest at the rate of 5 per cent per annum on the sum of \$3,234.88 from June 15, 1915, and on the sum of \$1,000.00 from March 28, 1927, to be restored to said permanent fund on account of the wrongful reimbursement from said permanent fund [fol. 47] of said amounts on said dates, as set forth in paragraph numbered 11 hereof.

6. For the sum of \$1,735,841.34, to be restored to said permanent fund on account of the wrongful disbursement of more than 5 per cent thereof under appropriations for self-support and civilization, as set forth in paragraph numbered 13 hereof, with interest at the rate of 5 per cent per annum on all amounts so disbursed in excess of said 5 per cent from the date of the respective disbursements.

7. For the sum of \$547,421.25 to be restored to said permanent fund on account of wrongful disbursements therefrom without authority of any Acts appropriating the same for the purpose of promoting civilization and self-support, as set forth in paragraph numbered 14 hereof, together with interest at the rate of 5 per cent per annum on the various amounts so wrongfully disbursed from the dates of the respective disbursements.

8. In the event that the recoveries prayed for in the last two preceding paragraphs hereof, or any part thereof, are denied, then for the sum of \$2,311,493.19, to be restored to said permanent fund on account of the wrongful disbursement therefrom of the items set forth in paragraph numbered 15 hereof, together with interest at the rate of 5 per

cent per annum on each item of such disbursement from the date when such disbursement was made.

9. For the sum of \$5,684,341.60 to be restored to said permanent fund on account of the wrongful disbursement of [fol. 48] per capita cash payments set forth in paragraph numbered 16 hereof, together with interest at the rate of 5 per cent per annum from the date of each such disbursement.

10. For the sum of \$228,493.85 to be restored to said "Interest on Chippewas in Minnesota Fund" on account of the wrongful disbursement from said fund of the items set forth in paragraph numbered 17 hereof, together with interest at the rate of 5 per cent per annum on each of said items of wrongful disbursement from the date of each such disbursement.

11. For the sum of \$150,000.00 to be restored to said "Interest on Chippewas in Minnesota Fund" on account of wrongful disbursement of portions of said interest to persons not beneficiaries of said trust and not entitled thereto, as set forth in paragraph numbered 18 hereof, together with interest at the rate of 5 per cent per annum on each item of such wrongful disbursement from date of each such disbursement.

12. For their costs and disbursements.

13. For such other, different or further relief as to the court may seem just and equitable.

Chippewa Indians of Minnesota, Plaintiffs, by Webster Ballinger, Baldwin, Baldwin, Holmes & Mayall, Their Attorneys.

[fols. 49-50] *Duly sworn to by Webster Ballinger and D. S. Holmes. Jurat omitted in printing.*

[fol. 51] III. GENERAL TRAVERSE—Filed October 1, 1935

And now comes the Attorney General, on behalf of the United States, and answering the second amended petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the second amended petition be dismissed.

Henry W. Blair, Assistant Attorney General.

#### IV. ARGUMENT AND SUBMISSION OF CASE

On January 20, 1938, this case was argued and submitted on merits by Mr. Donald S. Holmes, for plaintiff, and by Mr. Raymond T. Nagle and Mr. Walter C. Shoup, for defendant.

#### V. FURTHER PROCEEDINGS IN CASE

On November 14, 1938, the court filed special findings of fact, conclusion of law, with an opinion by Booth, Ch. J., and entered a judgment dismissing the petition.

On December 2, 1938, the defendant filed a motion for a new trial.

On December 16, 1938, the plaintiffs filed a motion for amended findings of fact and for new trial.

[fol. 52] VI. **Special Findings of Fact, as Amended, Conclusion of Law, Original Opinion Announced November 14, 1938, and Supplemental Opinion by Booth, Ch. J.—Filed January 9, 1939**

Mr. Donald S. Holmes for the plaintiffs. Mr. Webster Ballinger and Holmes, Mayall, Reavill & Neimeyer were on the briefs.

Messrs. Raymond T. Nagle and Walter C. Shoup, with whom was Mr. Assistant Attorney General Carl McFarland, for the defendant. Mr. George T. Stormont was on the brief.

This case having been heard by the Court of Claims, the court, upon the evidence adduced, makes the following

#### SPECIAL FINDINGS OF FACT

1. This suit is brought under a special jurisdictional act approved May 14, 1926 (41 Stat. 555), as amended by acts of April 11, 1928 (45 Stat. 423), and June 18, 1934 (48 Stat. 979), which act as so amended provides in part as follows:

Sec. 1. That jurisdiction be, and is hereby, conferred upon the Court of Claims, with right of appeal to the Su-



preme Court of the United States by either party as in other cases, notwithstanding the lapse of time or statute of limitations, to hear, examine, and adjudicate and render judgment in any and all legal and equitable claims arising under or growing out of the Act of January 14, 1889 (25 Stat. L. 642), or arising under or growing out of any subsequent Act of Congress in relation to Indian Affairs which said Chippewa Indians of Minnesota may have against the United States, which claims have not heretofore been determined [fol. 53] mined and adjudicated on their merits by the Court of Claims or the Supreme Court of the United States. In any such suit or suits the plaintiffs, the Chippewa Indians of Minnesota, shall be considered as including and representing all those entitled to share in the final distribution of the permanent fund provided for by Section 7 of the Act of January 14, 1889 (25 Stat. L. 642), and the agreements entered into thereunder: Provided, That nothing herein shall be construed to affect the powers of the Secretary of the Interior to determine the roll or rolls of the Chippewa Indians of Minnesota for the purpose of making any distribution of the permanent Chippewa fund or of the interest accruing thereon or of the proceeds of any judgments: Provided further, That nothing herein shall be construed to authorize the submission to the Court of Claims for determination of any individual claim or claims to enrollment with the Chippewa Indians of Minnesota or to share in the interest or principal of the permanent Chippewa fund or in any funds hereafter acquired: Provided further, That the qualifications necessary to such enrollment shall not be changed or affected in any manner by the provisions of this Act.

Sec. 3. In said suit or suits the court shall also hear, examine, consider, and adjudicate any claims which the United States may have against the said Chippewa Indians, and any payment or payments which may have been made by the United States upon any claim against the United States by said Indians shall not operate as an estoppel, but may be pleaded as an offset in such suit or suits as may gratuities, if any, paid to or expended for said Indians subsequent to January 14, 1889.

Sec. 4. If it be determined by the court that the United States, in violation of the terms and provisions of any law, treaty, or agreement as provided in Section 1 hereof,

has unlawfully appropriated or disposed of any money or other property belonging to the Indians, damages therefor shall be confined to the value of the money or other property at the time of such appropriation or disposal, together with interest thereon, at 5 per centum per annum from the date thereof; and with reference to all claims which may be the subject matter of the suits herein authorized, the decree of the court shall be in full settlement of all damages, if any, committed by the Government of the United States and shall annul and cancel all claim, right, and title of the said Chippewa Indians in and to such money or other property.

2. Plaintiffs, the Chippewa Indians of Minnesota, who constitute the class designated and described in the Act of [fol. 54] January 14, 1889 (25 Stat. 642), as "all of the Chippewa Indians of Minnesota," and the class authorized by the acts aforesaid to maintain suits as therein provided, filed their petition in this court on April 13, 1927, and defendant filed its general traverse thereto on May 23, 1927. Thereafter on August 18, 1930, pursuant to leave granted by order of this court of that date, plaintiffs duly filed their amended petition. On September 27, 1930, defendant filed its general traverse to the amended petition. On August 22, 1935, plaintiffs by leave of court filed their second amended petition and on October 1, 1935, defendant filed its general traverse thereto.

3. On and long prior to the approval of the Act of Congress of January 14, 1889 (supra), the various bands or tribes of Chippewa Indians in Minnesota resided on twelve reservations in that State as to which the Indian title had not been extinguished.

4. The act of January 14, 1889 (supra), entitled "An Act for the Relief and Civilization of the Chippewa Indians in Minnesota," is in words and figures as follows:

An Act for the Relief and Civilization of the Chippewa Indians in the State of Minnesota

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President of the United States is hereby authorized and directed, within sixty days after the pas-

sage of this act, to designate and appoint three Commissioners, one of whom shall be a citizen of Minnesota, whose duty it shall be, as soon as practicable after their appointment, to negotiate with all the different bands or tribes of Chippewa Indians in the State of Minnesota for the complete cession and relinquishment in writing of all their title and interest in and to all the reservations of said Indians in the State of Minnesota, except the White Earth and Red Lake Reservations, and to all and so much of these two reservations as in the judgment of said commission is not required to make and fill the allotments required by this and existing acts, and shall not have been reserved by the Commissioners for said purposes, for the purposes and upon the terms hereinafter stated; and such session and relinquishment shall be deemed sufficient as to each of said several reservations, except as to the Red Lake Reservation, if made and assented to in writing by two-thirds of the male adults over eighteen years of age of the band or tribe of Indians occupying and belonging to such reservations; and as to the Red Lake Reservation the cession and relinquishment shall be deemed sufficient if made and assented to in like manner by two-thirds of the male adults of all the Chippewa Indians in Minnesota; and provided that all agreements therefor shall be approved by the President of the United States before taking effect: Provided further, That in any case where an allotment in severalty has heretofore been made to any Indian of land upon any of said reservations, he shall not be deprived thereof or disturbed therein except by his own individual consent separately and previously given, in such form and manner as may be prescribed by the Secretary of the Interior. And for the purpose of ascertaining whether the proper number of Indians yield and give their assent as aforesaid, and for the purpose of making the allotments and payments hereinafter mentioned, the said commissioners shall, while engaged in securing such cession and relinquishment as aforesaid and before completing the same, make an accurate census of each tribe or band, classifying them into male and female adults, and male and female minors; and the minors into those who are orphans and those who are not orphans; giving the exact numbers of each class, and making such census in duplicate lists, one of which shall be filed with the Secretary of the Interior, and the other

with the official head of the band or tribe; and the acceptance and approval of such cession and relinquishment by the President of the United States shall be deemed full and ample proof of the assent of the Indians, and shall operate as a complete extinguishment of the Indian title without any other or further act or ceremony whatsoever for the purposes and upon the terms in this act provided.

Sec. 2. That the said commissioners shall, before entering upon the discharge of their duties, each give a bond to the United States in the sum of ten thousand dollars, with sufficient sureties, to be approved by the Secretary of the Interior, and conditioned for the faithful discharge of their duties under this act, and they shall also each take an oath to support the Constitution of the United States and to faithfully discharge the duties of their office, which bonds and oaths shall be filed with the Secretary of the Interior. Said commissioners shall be entitled to a compensation of [fol. 56] ten dollars per day for each day actually employed in the discharge of their duties, and for their actual traveling expenses and board, not exceeding three dollars per day. Said commissioners shall also be authorized to employ a competent interpreter while engaged in the performance of their duties, at a compensation and allowance to be fixed by them, not in excess of that allowed to each of them under this act.

Sec. 3. That as soon as the census has been taken, and the cession and relinquishment has been obtained, approved, and ratified, as specified in section one of this act, all of said Chippewa Indians in the State of Minnesota, except those on the Red Lake Reservation, shall, under the direction of said commissioners, be removed to and take up their residence on the White Earth Reservation, and thereupon there shall, as soon as practicable, under the direction of said commissioners, be allotted lands in severalty to the Red Lake Indians on Red Lake Reservation, and to all the other of said Indians on White Earth Reservation, in conformity with the act of February eighth, eighteen hundred and eighty-seven, entitled "An act for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes"; and all allotments heretofore made to any of said Indians on the

White Earth Reservation are hereby ratified and confirmed with the like tenure and condition prescribed for all allotments under this act: Provided, however, That the amount heretofore allotted to any Indian on White Earth Reservation shall be deducted from the amount of allotment to which he or she is entitled under this act: Provided further, That any of the Indians residing on any of said reservations may, in his discretion, take his allotment in severalty under this act on the reservation where he lives at the time of the removal herein provided for is effected, instead of being removed to and taking such allotment on White Earth Reservation.

Sec. 4. That as soon as the cession and relinquishment of said Indian title has been obtained and approved as aforesaid, it shall be the duty of the Commissioners of the General Land Office to cause the lands so ceded to the United States to be surveyed in the manner provided by law for the survey of public lands, and as soon as practicable after such survey has been made, and the report, field notes, and plats thereof filed in the General Land Office, and duly approved [fol. 57] proved by the Commissioner thereof, the said Secretary of the Interior, upon notice of the completion of such surveys, shall appoint a sufficient number of competent and experienced examiners, in order that the work may be done within a reasonable time, who shall go upon said lands thus surveyed and personally make a careful, complete, and thorough examination of the same by forty-acre lots, for the purpose of ascertaining on which lots or tracts there is standing or growing pine timber, which tracts on which pine timber is standing or growing for the purposes of this act shall be termed "pine lands," the minutes of such examination to be at the time entered in books provided for that purpose, showing with particularity the amount and quality of all pine timber standing or growing on any lot or tract, the amount of such pine timber to be estimated by feet in the manner usual in estimating such timber, which estimates and reports of all such examinations shall be filed with the Commissioner of the General Land Office as a part of the permanent records thereof, and thereupon that officer shall cause to be made a list of all such pine lands, describing each forty-acre lot or tract thereof separately, and opposite each such description he shall place the actual cash value of the same, according to his best judgment and information, but such valuation shall not be at a rate of less than



three dollars per thousand feet, board measure of the pine timber thereon, and thereupon such lists of lands so appraised shall be transmitted to the Secretary of the Interior for approval, modification, or rejection, as he may deem proper. If the appraisals are rejected as a whole, then the Secretary of the Interior shall substitute a new appraisal and the same or original list as approved or modified shall be filed with the Commissioner of the General Land Office as the appraisal of said lands, and as constituting the minimum price for which said lands may be sold, as hereinafter provided, but in no event shall said pine lands be appraised at a rate of less than three dollars per thousand feet board measure of the pine timber thereon. Duplicate lists of said lands as appraised, together with copies of the field-notes, surveys, and minutes of examinations, shall be filed and kept in the office of the register of the land office of the district within which said lands may be situated, and copies of said lists with the appraisals shall be furnished to any person desiring the same upon application to the Commissioner of the General Land Office or to the register of said local land office.

[fol. 58] The compensation of the examiners so provided for in this section shall be fixed by the Secretary of the Interior, but in no event shall exceed the sum of six dollars per day for each person so employed, including all expenses.

All other lands acquired from the said Indians on said reservation other than pine lands are for the purposes of this act termed "agricultural lands."

Sec. 5. That after the survey, examination and appraisals of said pine lands has been fully completed they shall be proclaimed as in market and offered for sale in the following manner: The Commissioner of the General Land Office shall cause notices to be inserted once in each week for four successive weeks in one newspaper of general circulation published in Minneapolis, Saint Paul, Duluth, and Crookston, Minnesota; Chicago, Illinois; Milwaukee, Wisconsin; Detroit, Michigan; Philadelphia and Williamsport, Pennsylvania; and Boston, Massachusetts, of the sale of said lands at public auction to the highest bidder for cash at the local land office of the district within which said lands are located, said notice to state the time and place and terms of such sale. At such sale said lands shall be offered in Forty-acre parcels, except in case of fractions containing either more or less than forty acres, which shall be sold entire. In no event

shall any parcel be sold for a less sum than its appraised value. The residue of such lands remaining unsold after such public offering shall thereafter be subject to private sale for cash at the appraised value of the same upon application at the local land office.

Sec. 6. That when any of the agricultural lands on said reservation not allotted under this act nor reserved for the future use of said Indians have been surveyed, the Secretary of the Interior shall give thirty days' notice through at least one newspaper published at Saint Paul and Crookston, in the State of Minnesota, and, at the expiration of thirty days, the said agricultural lands so surveyed shall be disposed of by the United States to actual settlers only under the provisions of the homestead law: Provided, That each settler under and in accordance with the provisions of said homestead laws shall pay to the United States for the land so taken by him the sum of one dollar and twenty-five cents for each and every acre, in five equal annual payments, and shall be entitled to a patent therefor only at the expiration of five years from the date of entry, according to said homestead laws, and after the full payment of said one dollar and twenty-five cents per acre therefor, and due proof of occupancy for said period of five years; and any conveyance of said lands so taken as a homestead, or any contract touching the same, prior to the date of final entry, shall be null and void: Provided, That nothing in this act shall be held to authorize the sale or other disposal under its provision of any tract upon which there is a subsisting, valid, pre-emption, or homestead entry, but any such entry shall be proceeded with under the regulations and decisions in force at the date of its allowance, and if found regular and valid, patents shall issue thereon: Provided, That any person who has not heretofore had the benefit of the homestead or pre-emption law, and who has failed from any cause to perfect the title to a tract of land heretofore entered by him under either of said laws, may make a second homestead entry under the provisions of this act.

Sec. 7. That all money accruing from the disposal of said lands in conformity with the provisions of this act shall, after deducting all the expenses of making the census, of obtaining the cession and relinquishment, of making the removal and allotments, and of completing the surveys and appraisals, in this act provided, be placed in the Treasury of the United States to the credit of all the Chippewa In-

dians in the State of Minnesota as a permanent fund, which shall draw interest at the rate of five per centum per annum, payable annually for the period of fifty years, after the allotments provided for in this act have been made, and which interest and permanent fund shall be expended for the benefit of said Indians, in manner following: One-half of said interest shall, during the said period of fifty years, except in the cases hereinafter otherwise provided, be annually paid in cash in equal shares to the heads of families and guardians of orphan minors for their use; and one-fourth of said interest shall, during the same period and with the like exception, be annually paid in cash in equal shares per capita to all other classes of said Indians; and the remaining one-fourth of said interest shall, during the said period of fifty years, under the direction of the Secretary of the Interior, be devoted exclusively to the establishment and maintenance of a system of free schools among said Indians, in their midst and for their benefit; and at the expiration of the said fifty years the said permanent fund shall be divided and paid to all of said Chippewa Indians and their issue [fol. 60] then living, in cash, in equal shares: Provided, that Congress may, in its discretion, from time to time, during the said period of fifty years, appropriate, for the purpose of promoting civilization and self-support among the said Indians, a portion of said principal sum, not exceeding five per centum thereof. The United States shall, for the benefit of said Indians, advance to them as such interest as aforesaid the sum of ninety thousand dollars annually, counting from the time when the removal and allotments provided for in this act shall have been made until such time as said permanent fund, exclusive of the deductions hereinbefore provided for, shall equal or exceed the sum of three million dollars, less any actual interest that may in the meantime accrue from accumulations of said permanent fund; the payments of such interest to be made yearly in advance, and, in the discretion of the Secretary of the Interior, may, as to three-fourths thereof, during the first five years be expended in procuring live-stock, teams, farming implements, and seed for such of the Indians to the extent of their shares as are fit and desire to engage in farming, but as to the rest, in cash; and whenever said permanent fund shall exceed the sum of three million dollars the United States shall be fully reimbursed out of such excess for all the advances of interest made as herein contemplated and other expenses hereunder.

Sec. 8. That the sum of one hundred and fifty thousand dollars is hereby appropriated, or so much thereof as may be necessary, out of any money in the Treasury not otherwise appropriated, to pay for procuring the cession and relinquishment, making the census, surveys, appraisals, removal and allotments, and the first annual payment of interest herein contemplated and provided for, which money shall be expended under the direction of the Secretary of the Interior in conformity with the provisions of this act. A detailed statement of which expenses, except the interest aforesaid, shall be reported to Congress when the expenditures shall be completed.

Approved, January 14, 1889.

5. Within the time prescribed in Section 1 of the act of January 14, 1889 (*supra*), the President, as therein authorized, appointed as commissioners Hon. H. M. Rice, Rt. Rev. Martin Marty, and Joseph B. Whiting, who duly qualified and entered upon the discharge of their duties. These commissioners met with the various bands or tribes of Chippewa [fol. 61] Indians in Minnesota, held numerous council meetings with them at their various reservations, and while negotiating with each of said bands or tribes prepared census rolls, as the act provided, and concluded agreements of cession with all the different bands or tribes, as the act provided, and for the uses and purposes therein stated. The act of January 14, 1889, was embodied in each of the agreements, either verbatim or by express reference, and each such agreement recited the act had been read, interpreted, and thoroughly explained to the understanding of the Indians who consented and agreed to the act and accepted and ratified the same, and each agreement provided that the lands in question were ceded for the purposes and upon the terms stated in the act. The commissioners, after completing the census provided for by the act; and after the negotiation and execution of all the agreements, as aforesaid, on or about December 26, 1889, transmitted the same, together with the report of their transactions in connection therewith, through the Commissioner of Indian Affairs to the Secretary of the Interior. The Secretary of the Interior, on or about January 30, 1890, transmitted the commissioners' report and the agreements, together with his report thereon, to the President and, on March 4, 1890, the President accepted and approved the cessions and relinquish-



ments thus effected, endorsed and signed his approval upon each of the agreements made with the several tribes or bands of Chippewa Indians of Minnesota, and on March 4, 1890, transmitted these reports and agreements to the Congress.

6. Defendant proceeded with the disposal of the ceded lands and the timber thereon and established in the Treasury of the United States a permanent fund which was designated on defendant's books of account and is hereinafter referred to as "Chippewas in Minnesota Fund," in which from time to time it covered, deposited, and credited moneys accruing from the disposal of the ceded lands and timber, and which fund is the interest-bearing "permanent fund" referred to and provided for by Section 7 of the act. Defendant further established a non-interest-bearing fund designated in defendant's books of account and hereinafter referred to as "Interest on Chippewas of Minnesota Fund," [fol. 62] into which fund defendant covered various amounts from time to time as and for the interest accruing at the rate of 5% per annum on the amounts from time to time remaining in said permanent fund above described.

7. The first appropriation made by defendant for advance interest as provided in Section 7 of the act of January 14, 1889 (*supra*), was made by Section 8 of that act. Pursuant to this and subsequent annual acts of Congress passed in each of the years 1891 to 1910, both inclusive, each appropriating the sum of \$90,000 for "Advance Interest to Chippewas in Minnesota, Reimbursable," the defendant appropriated out of public funds a total sum of \$1,890,000. During the fiscal years 1891 to 1912, inclusive, defendant expended out of public funds so appropriated for the use and benefit of the Chippewa Indians of Minnesota the total sum of \$1,861,289.28, of which sum \$1,386,048.53 was disbursed in per capita cash payments to these Indians as advance interest in accordance with the act and agreements, and the balance of \$475,240.75 was disbursed for education, medical attention, hardware, glass, oils and paints, boats, docks, etc., and miscellaneous agency expenses.

Thereafter and during the fiscal years 1913 to 1925, inclusive, the defendant further expended out of these appropriations in per capita cash payments to these Indians for their use and benefit further sums totaling \$8,640.11, making the total amount so expended out of these appro-



appropriations during the fiscal years 1891-1925, both inclusive, \$1,869,929.39.

No interest actually accrued on the principal "Chippewas in Minnesota Fund" prior to the fiscal year ending June 30, 1897, the first deposits therein having been covered on September 30, 1896, and the first credit to "Interest on Chippewas in Minnesota Fund" was for interest accrued during the fiscal years 1897 to 1904, inclusive, aggregating \$334,898, which sum was covered into the interest fund on January 13, 1904, and July 1, 1904. All such interest thereafter accruing was covered into the "Interest on Chippewas in Minnesota Fund" semi-annually as the same accrued. There were no disbursements from the "Interest on Chippewas in Minnesota Fund" prior to the fiscal year ending June 30, 1911, when amounts aggregating \$26,741.79 were disbursed therefrom for education.

[fol. 63] The amounts so appropriated for advance interest and the amounts actually disbursed by defendant out of public funds as such advance interest under the appropriations aforesaid and the interest actually accruing on the "Chippewas in Minnesota Fund," during each fiscal year from 1891 to 1912, inclusive, are correctly shown in the following table:

Fiscal year ending June 30th	Appropriated for advance interest	Disbursed as advance interest	Interest actually accrued on Chippewa Fund
1891.....	\$90,000.00	\$73,677.24	\$0.00
1892.....	90,000.00	79,520.65	0.00
1893.....	90,000.00	73,481.77	0.00
1894.....	90,000.00	78,543.40	0.00
1895.....	90,000.00	82,370.75	0.00
1896.....	90,000.00	80,763.59	0.00
1897.....	90,000.00	86,000.91	12,078.30
1898.....	90,000.00	14,632.78	14,068.70
1899.....	90,000.00	95,211.39	35,425.41
1900.....	90,000.00	77,711.42	39,934.90
1901.....	90,000.00	57,976.41	47,619.67
1902.....	90,000.00	52,509.25	54,775.93
1903.....	90,000.00	55,439.75	57,913.80
1904.....	90,000.00	92,194.71	73,081.49
1905.....	90,000.00	100,865.04	116,116.35
1906.....	90,000.00	154,051.36	159,041.05
1907.....	90,000.00	181,655.46	216,242.25
1908.....	90,000.00	160,427.73	257,412.24
1909.....	90,000.00	85,776.31	297,962.18
1910.....	90,000.00	89,086.95	321,143.15
1911.....	90,000.00	89,082.98	345,568.34
1912.....	0.00	1,209.43	204,708.89
Total.....	\$1,890,000.00	\$1,861,289.28	\$2,253,093.65

During the fiscal years ending June 30, 1891 to 1896, inclusive, during which no interest actually accrued on the "Chippewas in Minnesota Fund," the total disbursements by defendant as advance interest, as aforesaid, aggregated \$468,357.40.

During the fiscal years ending June 30, 1897, to 1904, inclusive, during each of which years the interest actually accrued on the "Chippewas in Minnesota Fund" was less than \$90,000 per year, the total disbursements by defendant as advance interest, as aforesaid, aggregated \$530,776.62, and the total interest so accruing during those years aggregated \$334,898.

During each of the fiscal years ending June 30, 1905, to 1912, inclusive, the interest actually accrued on the "Chippewas in Minnesota Fund" exceeded \$90,000 per year and exceeded the total amount disbursed by defendant as interest and advance interests during such year.

[fol. 64] 8. The first appropriation made by Congress for advance interest, as provided by the act of January 14, 1889, was made by section 8 of the act and set up on the books of the Treasury as "Advance Interest to Chippewas in Minnesota (Reimbursable)." By subsequent annual acts passed in the years 1891 to 1910, inclusive, Congress in each act appropriated \$90,000 for the same account. The total amount thus appropriated was \$1,830,000. During the fiscal years 1891 to 1925, inclusive, expenditures were made from the advance interest account for the use and benefit of the Chippewa Indians in Minnesota, amounting to \$1,869,929.39.

Reimbursement of the major part of said expenditures was taken as follows: on May 16, 1911, from the "Chippewas in Minnesota Fund," \$896,246.93; and on May 16, 1911, and various other dates to March 28, 1927, from the "Chippewas in Minnesota Interest Fund," \$973,504.52, making a total reimbursement of \$1,869,751.45, or \$177.94 less than the total disbursements on this account.

9. In each of the years 1890 and 1892 to 1910, inclusive, Congress made appropriations out of public funds in the total sum of \$2,350,559. The purpose was stated in the following (or comparable) words: "To enable the Secretary of the Interior to carry out an Act entitled 'An Act for the relief and civilization of the Chippewa Indians in the State of Minnesota, and for other purposes,' approved January

penditures thereunder should be reimbursed to the United States "from the proceeds of sales of land ceded by the Chippewa Indians under the act [of 1889]" or "out of the proceeds of sale of their lands." These appropriations were carried to the account entitled "Relief and Civilization of Chippewas in Minnesota (Reimbursable)."

During the fiscal years 1891 to 1913, inclusive, expenditures in the total sum of \$2,338,625.32 were made under authority of the Secretary of the Interior for the use and benefit of these Indians. Included in the total were expenditures amounting to \$328,163.95 made for expenses of the Chippewa Commission; for surveying, allotting, sale, etc., of lands; for expenses, care, and sale of timber; for removals; for transportation, etc., of supplies; for councils and delegations; and for examining and appraising land. The balance [fol. 65] of the total sum, amounting to \$2,010,461.37, was expended for education; roads; bridges; clothing; provisions and other rations; agricultural implements and equipments; work and stock animals; feed and care of livestock; hardware, glass, oils, and paints; medical attention; Indian houses; household equipment; fuel and light; hospitals and equipment; pay of mechanics; miscellaneous employees; agricultural aid; miscellaneous agency expenses; agency buildings and repairs; saw and grist mills; miscellaneous building material; pay of farmers; burial of Indians; care of indigent Indians; telephone lines; boats, docks, etc., per capita cash payments; pay of agents and sub-agents; pay and expenses of Indian police; and annual celebration of the White Earth band.

Reimbursement for all these expenditures was taken from the "Chippewas in Minnesota Fund," as follows: on May 16, 1911, \$2,196,036.63; on June 11, 1912, \$139,550.59, and on May 26, 1913, \$3,241.27, making a total of \$2,338,828.49.

10. In addition to the sum of \$328,163.95 hereinbefore set forth, the amounts disbursed by defendant for the use and benefit of the Chippewa Indians of Minnesota pursuant to appropriations by Congress to enable the Secretary of the Interior to carry out the act of January 14, 1889, and for which defendant was reimbursed out of the "Chippewas in Minnesota Fund" on May 16, 1911, June 11, 1912, and May 26, 1913, included expenditures made by it for the following uses and purposes: Expenditures for education aggregating \$1,033,879.01; expenditures for roads in the sum of

\$37,714.77; for bridges, \$3,972.14; for clothing, \$3,475.18; for provisions and rations, \$69,275.42; agricultural implements and equipment, \$29,895.16; for work and stock animals, \$34,841.80; for feed and care of livestock, \$23,173.78; for hardware, glass, oils and paints, \$32,378.62; for medical attention, \$102,400.90; for Indian houses, \$170,019.30; for household equipment, \$14,424.69; for fuel and light, \$29,672.84; for hospitals and equipment, \$54.29; for pay of agency mechanics, \$100,387.58; for miscellaneous agency employees, \$184,029.22; for agricultural aid, \$26,031.89; for miscellaneous expenses of operating Indian agencies in Minnesota, \$8,227.06; for the erection and repair of various Indian agency buildings in Minnesota, \$15,473.47; for saw and grist mills, \$18,456.96; for miscellaneous building materials, \$10,504.48; for pay of Indian farmers, \$26,785.93; for the burial of Indians, \$591.79; for the care of indigent Indians, \$16,479.65; for telephone lines, \$601.89; for boats and docks, \$11,189.56; for per capita payments, \$25.20; for pay of agents and subagents, \$1,350.00; for pay and expenses of Indian police, \$86.82; and for the holding of annual celebrations of the White Earth Band, \$5,061.97. The aggregate of all these items is \$2,010,461.37.

11. On or about May 16, 1911, defendant, by acts of Congress reimbursed itself from the "Chippewas in Minnesota Fund" for expenditures made for the use and benefit of the Chippewa Indians of Minnesota for the following purposes: For a drainage survey of ceded land, \$30,453.79; for an Indian school at Leech Lake, Minnesota, \$19,782.50; for an Indian school at Red Lake, Minnesota, \$35,000; for Indian school buildings for Chippewa Indians in Minnesota, \$17,974.54, the total of the amounts so reimbursed being \$103,210.83.

12. Defendant, by acts of Congress, reimbursed itself from the "Chippewas in Minnesota Fund" on the following dates for amounts previously expended by it for the use and benefit of the Chippewa Indians of Minnesota as follows: On June 15, 1915, for drainage surveys on lands ceded under the Act of January 14, 1889, and the agreements entered into thereunder, \$3,234.88, and on March 28, 1927, for education of Chippewas in Minnesota, \$1,000.

13. The total amount covered by defendant into or by it credited to the "Chippewas in Minnesota Fund" either

as proceeds of sales of land and timber or from other sources from the dates of the making of the cessions and agreements aforesaid to the end of the fiscal year 1927, the last date covered by the General Accounting Office Report herein, was \$17,662,325.70. The total amount withdrawn from this fund by defendant as reimbursement for its advances of interest and other expenditures for the use and benefit of the Chippewa Indians of Minnesota from its appropriations made by Congress out of public funds was \$3,967,465.79, leaving a net total of all credits to the fund, exclusive only of the amounts reimbursed as aforesaid, of \$13,694,859.91.

[fol. 67] 14. In each of the years from 1889 to 1910, inclusive, and in 1914 and 1915 Congress made appropriations from public funds for the use and benefit of the Chippewa Indians in Minnesota. The total amount appropriated was \$4,986,495.55. The acts making such appropriations in every instance directed that expenditures thereunder be reimbursed to the United States from the funds of the Chippewa Indians in Minnesota. The appropriations were allocated to and set up on the books of the Treasury in nine separate accounts designated as:

- Relief and Civilization of Chippewas in Minnesota (Reimbursable).
- Advance Interest to Chippewas in Minnesota (Reimbursable).
- Negotiating with, and Civilization of, Chippewas of Minnesota (Reimbursable).
- Surveying and Allotting for Chippewas in Minnesota (Reimbursable).
- Indian Schools, Chippewas in Minnesota: Buildings (Reimbursable).
- Indian School, Red Lake, Minn.: Buildings (Reimbursable).
- Indian School, Leech Lake, Minnesota: Buildings (Reimbursable).
- Drainage Survey, Chippewas of Minnesota (Reimbursable).
- Education, Chippewas of Minnesota (Reimbursable).

The total amount expended from these nine accounts for the use and benefit of the Chippewa Indians in Minnesota was \$4,941,029.66.



Reimbursement from the funds of these Indians was taken as follows:

From the principal fund:

May 16, 1911.....	\$3 820,439.05
June 11, 1912.....	139,550.59
May 26, 1913.....	3,241.27
June 15, 1915.....	3,234.88
March 28, 1927.....	1,000.00
	<hr/> 3,967,465.79

From the interest fund:

May 16, 1911, to March 28, 1927.....	\$973,504.52
July 5, 1916 (additional).....	84.58
	<hr/> 973,589.10

Total..... 4,941,054.89

[fol. 68] The total amount reimbursed exceeded the total expenditure by \$25.23.

15. Annually during the years 1911 to 1926, inclusive, Congress appropriated and made available during the fiscal years 1912 to 1927, inclusive, various amounts, aggregating \$2,754,500, from the "Chippewas in Minnesota Fund" (the principal fund) for promoting civilization and self-support among the Chippewa Indians of Minnesota.

The following table shows (a) the fiscal years, (b) the balance in the "Chippewas in Minnesota Fund" at the beginning of each fiscal year, (c) the total amount appropriated and made available for each fiscal year, (d) citations to the appropriation acts, and (e) for each fiscal year the relation by percentage of the items in column (c) to the items in column (b):

Fiscal year	Amount of fund	Amount appropriated	Stat.	Percent of fund
1912.....	\$4,099,606.24	\$168,500.00	36-1065.....	4.1
1913.....	4,382,924.96	166,000.00	37-525.....	3.7
1914.....	4,995,438.82	170,000.00	38-88, 90.....	3.4
1915.....	5,740,995.54	266,000.00	38-590.....	4.6
1916.....	6,108,399.64	161,000.00	38-1228.....	2.6
1917.....	6,277,587.96	197,250.00	39-134.....	3.1
1918.....	5,605,827.26	197,000.00	39-977.....	3.5
1919.....	5,788,770.28	186,000.00	40-572.....	3.2
1920.....	5,839,863.52	193,000.00	41-13.....	3.3
1921.....	5,928,211.49	71,000.00	41-419.....	1.2
1922.....	6,001,814.71	105,200.00	41-1235.....	1.7
1923.....	4,709,719.30	141,576.00	42-569.....	3.0
1924.....	6,192,937.48	145,000.00	42-1190.....	2.3
1925.....	4,860,394.96	213,150.00	43-42, 407, 411, 1329.....	4.3
1926.....	3,942,636.10	185,330.00	43-1158, 1162.....	4.7
1927.....	4,855,308.99	188,500.00	44-471, 475.....	3.8

Total Appropriated..... 2,754,500.00

The Secretary of the Interior, in a report dated November 8, 1927 (filed on March 5, 1930), at pp. 6 and 7 stated:

Attention is invited to that part of Section 7 of the Act of January 14, 1889, providing as follows:

"Provided, That Congress may, in its discretion, from time to time during said period of fifty years, appropriate, for the purpose of promoting civilization and self-support among the said Indians, a portion of the principal sum, not exceeding five per cent thereof."

The following statement shows the amounts appropriated annually from 1912 to 1927, inclusive, and the approximate expenditures which included sums for agency expenses, [fol 69] maintenance of schools, aiding indigent Chippewa Indians, construction and support of hospitals, tuition of Chippewa children enrolled in public schools, purchases of homes for Indians, etc. [Citations to Statutes, which agree substantially with those in the table next above, are here omitted]:

Fiscal year	Appropriated	Expended
1912	\$168,500.00	\$142,211.93
1913	166,000.00	145,675.60
1914	170,000.00	161,598.19
1915	265,000.00	263,432.63
1916	161,000.00	155,393.98
1917	197,250.00	181,729.51
1918	197,000.00	189,527.25
1919	186,000.00	182,893.16
1920	193,000.00	176,943.12
1921	71,000.00	66,178.82
1922	105,200.00	98,340.32
1923	141,570.00	126,333.63
1924	145,000.00	133,168.54
1925	190,000.00	172,242.55
	23,150.00	
1926	185,330.00	159,715.72
1927	188,500.00	170,642.79
Total	2,754,500.00	2,526,267.74

The report of the Comptroller General contains an analysis of all expenditures made from the "Chippewas in Minnesota Fund" during the fiscal period 1905-1927.

16. In addition to the amounts taken by defendant from the "Chippewas in Minnesota Fund" as reimbursement for its advances of interest and certain of its expenses under the Act of January 14, 1889, amounts taken by defendant from that fund to reimburse itself for moneys expended

under appropriations to enable the Secretary of the Interior to carry out the Act of January 14, 1889, and for other purposes, the amounts expended by defendant from that fund pursuant to appropriations made by Congress "for the purposes of promoting civilization and self-support among said Indians," and amounts taken by defendant under congressional authority from the fund and disbursed by it in per capita cash payments for the use and benefit of the Chippewa Indians of Minnesota as hereinafter set forth, defendant, between June 30, 1904, and June 30, 1927, took and disbursed from the "Chippewas in Minnesota Fund" for the use and benefit of the Chippewa Indians of Minnesota without authority of any act of its Congress specifically appropriating the same "for the purpose of promoting civilization and self-support," the further sum of \$547,421.25.

The said sum of \$547,421.25 is part of the whole sum of \$669,606.34 expended by defendant from the "Chippewas in Minnesota Fund" for the benefit of the Chippewa Indians of Minnesota under authority of the act of January 14, 1889 (*supra*), for expenses, surveying, allotting, sale, etc., of lands; expenses, care, and sale of timber; removals; transportation of supplies; councils and delegations; examining and appraising land, as more fully set out hereinafter.

17. Included in the amounts disbursed by defendant from the "Chippewas in Minnesota Fund" other than the amounts disbursed therefrom for purposes authorized by the act of January 14, 1889 (*supra*), and as per capita cash payments of principal as hereinafter set forth were the following amounts expended by defendant for the use and benefit of the Chippewa Indians of Minnesota for the following purposes: For education, \$439,592.00; for roads, \$67,692.52; for bridges, \$4,432.42; for payments to the Minnesota Public School System as tuition on account of the attendance of Chippewa Indian children, \$140,854.85; for payments to the Minnesota Public School System for the purchase of school grounds and the erection of school-buildings constituting a part of the Public School System and the property of the State, \$43,662.96; for the purchase of lands for allotments to individual Indians, \$40,017.31; for clothing, \$4,981.01; for provisions and rations, \$100,650.41.

for medical attention to Indians requiring same, \$492,224.95; for Indian houses erected for various individuals, \$73,533.47; for household equipment, \$10,192.85; for fuel and light, \$77,093.54; for hospitals and equipment available to such individuals as might require hospitalization, \$114,822.61; for pay of mechanics connected with Indian Agencies in Minnesota, \$86,975.66; for miscellaneous Indian Agency employees, \$358,383.63; for the transportation of supplies, \$36,924.26; for miscellaneous expenses of Indian Agencies in Minnesota, \$44,453.10; for the erection and repair of various buildings and structures, including sewer and water systems, etc., of Indian Agencies in Minnesota, \$10,869.61; for council and delegations, \$63,411.67; for pay of [fol. 71] Indian police, \$342.40; for the burial of Indians, \$2,268.72; for the annual celebration of the White Earth Band, \$8,381.10; for the care of indigent Indians, \$65,130.89; for the erection and maintenance of telephone lines, \$13,567.76; for a payment to certain former chiefs of the Mille Lac Band of Chippewa Indians, \$11,000.00; and for opening Indian Reservations, \$33.49. The total of these amounts is \$2,311,493.19.

The foregoing amounts were disbursed by defendant from the "Chippewas in Minnesota Fund" during the fiscal years ending June 30, 1905, to June 30, 1927, both inclusive, and the amounts so disbursed for each of the purposes during each of the fiscal years correctly appear in Disbursement Schedule No. 10, pages 182-233, General Accounting Office Report herein, which is hereby referred to and made a part hereof as a basis for the computation of interest.

18. In section 8 of the act of January 14, 1889, Congress appropriated from public funds \$60,000 to pay "for procuring the cession and relinquishment, making the census, surveys, appraisals, removal, and allotments." This amount was carried to the account entitled "Negotiating with, and Civilization of, Chippewas of Minnesota (Reimbursable)." During the fiscal years 1889 to 1894, inclusive, expenditures for expenses of the Chippewa Commission amounting to \$57,023.53 were made and on May 16, 1911, reimbursed to the United States from the principal fund.

In each of the years 1890 to 1899, inclusive, and in 1903, 1904, and 1906, Congress appropriated from public funds a

total sum of \$567,936.55 for the carrying out of the act of 1889, and particularly for surveys, appraisals, removals, allotments, expenses of the Commission, etc. This amount was carried to the account entitled "Surveying and Allotting for Chippewas in Minnesota (Reimbursable)."

During the fiscal years 1891 to 1907, inclusive, expenditures for expenses of the Commission, surveying, allotting, sale, etc., of lands; expenses, care and sale of timber, and examining and appraising land, amounting to \$567,921.13, were made, and on May 16, 1911, reimbursed to the United States from the principal fund.

[fol. 72] 19. Disbursements were made for the benefit of the Chippewa Indians of Minnesota from "Chippewas in Minnesota Fund" during the fiscal years in the amounts following:

Fiscal year:	Disbursements
1905.....	\$29,499.39
1906.....	44,626.49
1907.....	57,003.27
1908.....	45,805.07
1909.....	39,678.15
1910.....	50,454.59
1911.....	35,961.44
1912.....	164,606.39
1913.....	173,821.06
1914.....	198,720.78
1915.....	204,477.95
1916.....	227,560.09
1917.....	1,691,593.98
1918.....	207,399.70
1919.....	215,432.80
1920.....	201,197.63
1921.....	107,899.54
1922.....	1,358,712.79
1923.....	117,870.07
1924.....	1,500,930.90
1925.....	973,377.13
1926.....	929,190.64
1927.....	182,210.74
Total.....	\$8,758,030.59

The purposes for which these disbursements were made are as follows:

Per capita cash payments.....	\$5,684,341.60.
Expenses surveying, allotting sale, etc., of lands.....	\$18,762.69
Expenses, care and sale of timber.....	531,484.43
Removals.....	942.04
Transportation of supplies.....	36,924.26
Councils and delegations.....	63,411.67
Examining and appraising land.....	18,081.25
	<hr/> 669,606.34



[fol. 73]

Drainage surveys	\$74.99	
Agricultural implements and equipment	19,242.77	
Work and stock animals	19,184.56	
Feed and care of livestock	49,303.91	
Hardware, glass, oils, and paints	10,083.51	
Agricultural aid	23,243.76	
Saw and grist mills	7,876.17	
Miscellaneous building material	6,103.28	
Pay of interpreters	8,341.42	
Pay of farmers	42,485.82	
Boats, docks, etc.	6,974.08	
Investigating land frauds	11.12	
		<hr/>
		\$192,925.39
Education	439,592.00	
Roads	67,692.52	
Bridges	4,432.42	
Payment to Minnesota Public School System for tuition	140,854.85	
For buildings and grounds	43,662.96	
Purchase of land for allotment	40,017.31	
Clothing	4,981.01	
Provisions and other rations	100,650.41	
Medical attention	492,224.95	
Indian houses	73,533.47	
Household equipment	10,192.85	
Fuel and light	77,093.54	
Hospitals and equipment	114,822.61	
Pay of mechanics	86,975.66	
Miscellaneous employees	358,383.63	
Miscellaneous Agency expenses	44,453.10	
Agency buildings and repairs	10,869.61	
Pay and expenses of Indian police	342.40	
Burial of Indians	2,268.72	
Annual celebration of White Earth Band	8,381.10	
Care of indigent Indians	65,130.89	
Telephone lines	13,567.76	
Payment to Mille Lac chiefs	11,000.00	
Opening Indian reservations	33.49	
		<hr/>
		2,211,157.26
Total disbursements		<hr/>
		8,758,030.59

20. During the period January 14, 1889, to June 30, 1934, the United States expended out of its public funds for the use and benefit of the Chippewa Indians of Minnesota the sum of \$5,065,878.95, no part of which sum has been reimbursed to the United States.

[fol. 74] 21. In accord with the following acts of Congress, May 18, 1916 (39 Stat. 135); November 19, 1921 (42 Stat. 221); January 25, 1924 (43 Stat. 1); January 30, 1925 (43 Stat. 798); and February 19, 1926 (44 Stat. 7), per capita payments were made by the Secretary of the Interior from the principal fund in the Treasury to the credit of plaintiffs. The amounts and dates of payments appear in the following table:

Fiscal year ending June 30th:	Amount distributed
1917	\$1,490,668.40
1918	7,107.22
1919	2,167.37
1920	4,962.80
1921	2,873.20
1922	1,270,666.39
1923	5,491.80
1924	1,353,096.66
1925	774,761.91
1926	768,898.11
1927	3,647.64

Total principal disbursed in cash 5,684,341.50

22. Since the per capita distributions out of said permanent funds made by defendant as set forth in the preceding finding a number of persons receiving such payments have died; the record herein shows the persons so dying, and the amounts distributed to such decedents only to June 30, 1927; and the amounts so disbursed by defendant in per capita payments out of said principal fund to persons who thereafter died, and the respective fiscal years during which such amounts were so disbursed to such decedents are shown by the following tabulation:

Fiscal year ending June 30th:	Amount
1917	\$231,162.00
1922	91,300.00
1924	58,700.00
1925	21,300.00
1926	13,050.00
Total	415,512.00

23. In addition to the ratification provided in the acts set forth in Finding 21, each Indian receiving a payment under [fol. 75] said acts was required by the Secretary of the Interior to sign the following form of release:

In consideration of the payment represented by check No. —, dated — —, —, I hereby release and quitclaim unto the United States forever all my right, title, and interest in and to that portion of the principal fund of the Chippewa

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Indians of Minnesota arising under the act of January 14, 1889, which has been or shall be distributed per capita to said Indians under the Act of —, to the extent of \$—.

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#### CONCLUSION OF LAW

Upon the foregoing special findings of fact, which are made part of the judgment herein, the court decides as a conclusion of law that the plaintiffs are not entitled to recover and the petition is therefore dismissed.

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#### ORIGINAL OPINION ANNOUNCED NOVEMBER 14, 1938

Booth, Chief Justice, delivered the opinion of the court:

The special jurisdictional act enabling the plaintiff Indians to sue in this court appears in Finding 1. The case grows out of alleged failure of the defendant to discharge its obligations under the act of January 14, 1889 (25 Stat. 642), and especially Sections 7 and 8 of that act. A judgment for a large sum of money is sought.

The act of January 14, 1889, has been several times before the Supreme Court. It is unnecessary to elaborate upon what the Supreme Court held to be its scope and purpose. It is sufficient for the purposes of this case to state that Congress in enacting the act clearly intended to put in effect the Government's prevailing Indian policy, i. e., secure the dissolution of the various Indian Bands and Tribes involved, allot them lands in severalty, dispose of surplus lands for their benefit, and otherwise seek to civilize the Indians themselves. This act appears in Finding 4.

The plaintiff Indians assented to the provisions of the act of 1889, *supra*. The various bands ceded their lands in accord with the same. Allotments were made and accepted and the surplus lands, both timber and agricultural, were sold, accumulating a sum of money aggregating in excess of sixteen million dollars.

[fol. 76] Inasmuch as the crucial issue in this case is more or less restricted to Sections 7 and 8 of the act of 1889, despite repetition, we insert at this point the provisions of the same, to wit:

Sec. 7. That all money accruing from the disposal of said lands in conformity with the provisions of this act shall, after deducting all the expenses of making the census, of obtaining the cession and relinquishment, of making the removal and allotments, and of completing the surveys and appraisals, in this act provided, be placed in the treasury of the United States to the credit of all the Chippewa Indians in the State of Minnesota as a permanent fund, which shall draw interest at the rate of five per centum per annum, payable annually for the period of fifty years, after the allotments provided for in this act have been made, and which interest and permanent fund shall be expended for the benefit of said Indians in manner following: One-half of said interest shall, during the said period of fifty years, except in the cases hereinafter otherwise provided, be annually paid in cash in equal shares to the heads of families and guardians of orphan minors for their use; and one-fourth of said interest shall, during the same period and with the like exception, be annually paid in cash in equal shares per capita to all other classes of said Indians; and the remaining one-fourth of said interest shall, during the said period of fifty years, under the direction of the Secretary of the Interior, be devoted exclusively to the establishment and maintenance of a system of free schools among said Indians, in their midst and for their benefit; and at the expiration of the said fifty years, the said permanent fund shall be divided and paid to all of said Chippewa Indians and their issue then living in cash, in equal shares: Provided, That Congress may, in its discretion, from time to time, during the said period of fifty years, appropriate, for the purpose of promoting civilization and self-support among the said Indians, a portion of said principal sum, not exceeding five per centum thereof. The United States shall, for the benefit of said Indians, advance to them as such interest as aforesaid the sum of ninety thousand dollars annually, counting from the time when the removal and allotments provided for in this act shall have been made, until such time as said permanent fund, exclusive of the deductions hereinbefore provided for, shall equal or exceed the [fol. 77] sum of three million dollars, less any actual interest that may in the meantime accrue from accumulations of said permanent fund; the payments of such interest to be made yearly in advance, and, in the discretion of the Secretary of the Interior, may, as to three-fourths thereof, during the



first five years be expended in procuring live-stock, teams, farming implements, and seed for such of the Indians to the extent of their shares as are fit and desire to engage in farming, but as to the rest, in cash; and whenever said permanent fund shall exceed the sum of three million dollars the United States shall be fully reimbursed out of such excess, for all the advances of interest made as herein contemplated and other expenses hereunder.

Sec. 8. That the sum of one hundred and fifty thousand dollars is hereby appropriated, or so much thereof as may be necessary, out of any money in the Treasury not otherwise appropriated, to pay for procuring the cession and relinquishment, making the census, surveys, appraisals, removal and allotments, and the first annual payment of interest herein contemplated and provided for, which money shall be expended under the direction of the Secretary of the Interior in conformity with the provisions of this act. A detailed statement of which expenses, except the interest aforesaid, shall be reported to Congress when the expenditures shall be completed [25 Stat. 645].

The plaintiff Indians contend that the provisions of these sections created a conventional trust and thereby precluded the defendant from disbursing any of the funds involved except in strict accord with the same, which is the equivalent of saying that in this instance the conceded authority of Congress over tribal Indian lands and funds does not obtain. The defendant not only failed to observe the terms of the trust but, on the contrary, has depleted the trust fund by various disbursements to the Indians. The amount thus disbursed is the amount of the judgment sought.

The record establishes the fact that the defendant has disbursed from the fund created by Sections 7 and 8 of the act of 1889. We say disbursed—perhaps we should say has reimbursed the Treasury from the fund to the extent of appropriations made by Congress and paid to the plaintiff Indians, Congress authorizing the reimbursement in most instances, for purposes not mentioned in the act of 1889 and contrary to the terms of the alleged trust agreement.

[fol. 78] The act of 1889 is free from ambiguity. On the date of its enactment and subsequent approval it was the indisputable intent of Congress to conserve the tribal funds accruing from the sale of the surplus lands as provided

therein. Doubtless it was the belief of Congress that the income from the fund that was to be disbursed to the Indians annually during the fifty-year period would be sufficient, along with their individual landed estates, to maintain them, and at the same time would encourage the adoption of the ways of the Whites for themselves and future generations.

The total sum taken from the fund involved represents sums appropriated by Congress from public money which was paid directly to the Indians or for their benefit. The defendant in no way profited in doing what was done. It is not alleged and assuredly not established that the necessity for the appropriations made did not exist; hence, if the plaintiff Indians may recover all they claim, this court must hold that the fund was not a tribal one, and Congress in passing the act of 1889 surrendered its authority over Indian tribal funds and lands.

The twelve or thirteen bands of Chippewa Indians were tribal Indians. They held their reservations as tribal Indians. *Kadzie case*, 281 U. S. 206. True, some individual allotments had been made on certain reservations, but the greater acreage of their reservations was held and occupied as communal Indian lands. They were recognized by the defendant as tribal Indians, and the only possible distinction between the Chippewa Indians of Minnesota as a tribe and any other tribe of Indians was the division of the tribe into various bands. It was and is not now unusual to find a tribe of Indians made up of several bands who hold a reservation exclusive of other bands. This fact does not destroy the identity of the tribe or such or alter the character of the title by which their lands are held.

What was accomplished by the act of 1889 was a voluntary merger of all the tribal lands participated in by all the bands of the Chippewa Tribe, and consummated by cessions of all the Chippewa bands. It was in effect, and resulted in, a resumption of a tribal unit, always known as the Chippewa Indians of Minnesota—an abandonment of band organization and a return to a single tribal one.

[fol. 79] The plaintiff Indians insist that the act of 1889 created "a new class or entity" without tribal organization, possessing no lands or other property, devoid of leadership, and in fact having none of the characteristics of an Indian band or tribe. To this contention we cannot assent. The bands did cede their separate reservations and agreed to

take allotments on the Red Lake and White Earth Reservations, and thereafter participate upon an equal basis in the benefits to be derived from so doing. It was a transition from separate band organization to a unitary one, governed in precisely the same manner and under precisely the same laws applicable to the control and disposition of Indian lands by the Government.

The participants in this consolidation were all tribal Chippewa Indians. The lands ceded were tribal lands. The Indian bands surrendered whatever advantage they possessed because of band organization in the interest of their brethren, and agreed that all the Chippewa Indians in Minnesota, irrespective of bands, should take alike in the great Chippewa estate in Minnesota.

The fact that subsequent to the cession the ordinary Indian tribal organization in all its detail did not prevail is, we think, unimportant. Subsequent to the cession the lands were disposed of as communal Indian lands, the funds were recognized as also communal, and the entire administration of the Indian estate was conducted upon the basis of tribal lands and funds. The benefits to accrue from the same vested without discrimination in all the Chippewas of Minnesota. This was not the creation of a new class; it was simply the amalgamation of an old one.

Aside from all that has been said, it is of much more importance to give attention to the plaintiffs' contention that the defendant surrendered its plenary authority over Indian tribal lands and funds when the act of 1889 was approved. The contention is a novel one. It is, of course, conceded that this power and authority exist. *Lone Wolf v. Hitchcock*, 187 U. S. 553.

The plaintiff Indians argue that because Congress lacked the power to take the land of one of the bands and give it to another, it therefore lacked the power to do what was done [fol. 80] without the consent of the Indians, and thus surrendered its plenary power and authority over tribal Indian lands and funds. It is true Congress did not exert to the limit the power and authority it possessed when the act of 1889 was approved, but this fact does not import its non-existence. The limitations of the power extend only to an impairment or destruction of vested rights. *Gritts v. Fisher*, 224 U. S. 640.

The lands and funds of the various bands of Indians were tribal and subject to the plenary power and authority of

Congress. This fact is indisputable. Congress made annual appropriations for the bands and treated and recognized them as tribal. The Indians themselves made no claim to the contrary. When the Indians ceded the lands they transferred the title they possessed, and this transaction did not in any sense emancipate the Indians, render them *sui juris*, or dissolve the relationship of guardian and ward previously existing.

The act of 1889 expressly withholds from the Indians the administration of its provisions. Congress reserved the power and authority to administer it. Every provision of the law exhibits with positiveness the recognized inability of tribal Indians to adjust and settle this vast and valuable estate. Not a single provision of the act in any way imports either a willingness or intent to surrender the power and authority Congress possessed in the premises, or to abandon its traditional and legal authority to care for the welfare and civilization of tribal Indians.

It is true that the act of 1889 contained a referendum clause. It was not to become effective until approved by a certain number of the Indians and the President. This fact does not, however, change the established relationship of the defendant and the Indians. The mutual assent of the interested parties to the enactment of the act did not create a contract.

When Congress abandoned the policy of treating Indian Tribes as dependent nations with whom the Government made treaties respecting their tribal affairs, as it admittedly did in 1871, it assumed and has since then continuously exercised the power and authority to manage, control, regulate, and adjust tribal Indian affairs, including their lands [fol. 81] and funds. The assumption of this plenary authority has been more than once approved by the Supreme Court. *Lone Wolf v. Hitchcock*, *supra*.

In the enactment of statutes similar to the act of 1889 designed to relieve and civilize Indian tribes, Congress did not intend to surrender this existing plenary power and authority if subsequent conditions exhibited an acute necessity to alter the terms of a pre-existing act so long as subsequent legislation did not take from the Indians vested rights. As to lands and funds remaining after the vesting of rights of property, and so long as the subsequent acts did not take from the tribe lands belonging to it and give them to strangers or appropriate them to the Government, the



plenary power and authority of Congress over Indian tribal lands and funds exist.

The case of *Gritts v. Fisher*, *supra*, directly in point, negatives the contentions of the plaintiffs advanced in this case. The Supreme Court in deciding the above case said:

It is conceded, and properly so, that the later legislation is valid and controlling unless it impairs or destroys rights which the act of 1902 vested in members living September 1, 1902, and enrolled under that act. As has been indicated, their individual allotments are not affected. But it is said that the act of 1902 contemplated that they alone should receive allotments and be the participants in the distribution of the remaining lands, and also of the funds, of the tribe. No doubt such was the purport of the act. But that, in our opinion, did not confer upon them any vested right such as would disable Congress from hereafter making provision for admitting newly born members of the tribe to the allotment and distribution. The difficulty with the appellants' contention is that it treats the act of 1902 as a contract, when "it is only an act of Congress and can have no greater effect." *Cherokee Inter-marriage Cases*, 203 U. S. 76, 93. It was but an exertion of the administrative control of the Government over the tribal property of tribal Indians, and was subject to change by Congress at any time before it was carried into effect and while the tribal relations continued. *Stephens v. Cherokee Nation*, 174 U. S. 445, 488; *Cherokee Nation v. Hitchcock*, 187 U. S. 294; *Wallace v. Adams*, 204 U. S. 415, 423. [224 U. S. 648.]

Section 74 of the act of 1902 (32 Stat. 716), the initiatory legislation subsequently changed by the act of April 26, 1906 [fol. 82] (34 Stat. 137), as amended June 21, 1906 (34 Stat. 325, 340), involved in the *Gritts v. Fisher* case, *supra*, was submitted to the tribe for ratification. This section of the act of 1902 reads in part as follows:

This act shall not take effect or be of any validity until ratified by a majority of the whole number of votes cast by the legal voters of the Cherokee Nation in the manner following [32 Stat. 727].

The case of *Sizemore v. Brady*, 235 U. S. 441, involved the "original Creek Agreement." The issue raised was similar to the one in this case. It was contended by the plaintiff that



the original agreement was a grant in praesenti and vested absolute rights to allotments of Indian lands, and that Congress was powerless to impair or alter the original agreement. In deciding adversely to this contention the court said:

On the part of the maternal cousins it is contended that the provisions in the original agreement relating to the allotment and distribution of the tribal lands and funds were in the nature of a grant in praesenti and invested every living member of the tribe and the heirs, designated in the tribal laws, of every member who had died after April 1, 1899, with an absolute right to an allotment of lands and a distributive share of the funds, and that Congress could not recall or impair this right without violating the due process of law clause of the Fifth Amendment to the Constitution. To this we cannot assent. There was nothing in the agreement indicative of a purpose to make a grant in praesenti. On the contrary, it contemplated that various preliminary acts were to precede any investiture of individual rights. The lands and funds to which it related were tribal property and only as it was carried into effect were individual claims to be fastened upon them. Unless and until that was done Congress possessed plenary power to deal with them as tribal property. It could revoke the agreement and abandon the purpose to distribute them in severalty, or adopt another mode of distribution, or pursue any other course which to it seemed better for the Indians. And without doubt it could confine the allotment and distribution to living members of the tribe or make any provision deemed more reasonable than the first for passing to the relatives of deceased members the lands and money to which the latter would be entitled, if living. In short, the power of Congress [fol. 83] was not exhausted or restrained by the adoption of the original agreement, but remained the same thereafter as before, save that rights created by carrying the agreement into effect could not be divested or impaired. *Choate v. Trapp*, 224 U. S. 665, 671 [235 U. S. 449, 450].

We need not go back and discuss either the necessity of each individual band of Chippewas assenting to the passage of the act of 1889, or whether as a legal proposition the estate of all the bands might have been adjusted and finally settled by the exertion of the plenary power and authority.

of Congress. It seems to us of little consequence to the solution of the issues presented by the record. We know what the individual bands did. We know that as tribal Indians they accepted all the benefits accruing to them under the act of 1889 and in accord with its terms. We know that they approved the act of 1889, and whatever may have been their rights under separate band organization we know they voluntarily surrendered them to acquire others under the act of 1889.

What we intend to hold and what we think the record sustains is that "About the beginning of the last century the Chippewas constituted one of the larger Indian tribes in the northerly part of the United States. In early treaties they were dealt with as a single tribe and were shown to be occupying a large area reaching from Lake Huron on the east to and beyond Lake Superior on the west. In later treaties they were regarded as divided into distinct bands; and particular bands—in some instances a single band and in others a limited plurality of bands—were recognized as occupying separate areas in Michigan, Wisconsin, Minnesota, and eastern Dakota, and as entitled to hold or cede the same independently of other bands and of the Chippewas as a whole." *Chippewa Indians v. United States*, 301 U. S. 358, 360, 361.

The various bands acting independently did cede their tribal lands to the United States; pooled, as it were, all the Chippewa Indian lands in Minnesota previously held by individual bands, and by so doing rendered them the communal Indian lands of all the Chippewa Indians of Minnesota. The bands by assenting to the act of 1889 returned to a single tribal organization precisely as the same had existed before their recognition as separate bands.

[fol. 84] If Congress intended in 1889 to create a new Indian entity possessing characteristics wholly different from a tribal one, endowed with legal authority to receive the benefits of the sale and disposition of tribal lands and funds free from the control and authority of Congress, it is the first time in the history of Indian legislation that this has been done. It was, indeed, a wide and unusual departure from the established Indian policy of the Government. It is clear to us that Congress did not so intend.

The contentions of the plaintiffs as we understand them concern exclusively the rights of the Chippewa Indians of Minnesota and their issue living on the date stated in the

act of 1889 for the distribution of the so-called trust fund. This must be so, for the Chippewa Indians of Minnesota now living and those who survived the enactment of the act of 1889 have participated in and received the monetary benefits brought about by the Government's legislation which depleted the fund, and in no way have suffered loss or damage.

In other words, the present members of the Chippewa Indians of Minnesota cannot have a complaint, and if the plaintiffs are to recover for the designated "remaindermen" they will have received not only the benefits of the so-called trust fund during all these years but the Government will be required to duplicate the distribution to their heirs at the end of the fifty-year period. This conclusion we think is inescapable.

We have considered with care the numerous cases cited in the briefs of counsel and are absolutely unable to find one which holds that under an act of Congress providing for the settlement of Indian tribal estates a succeeding Congress is powerless to alter a former act, when after the enactment of the first act the succeeding one deems it essential for the good of the tribe to exercise its plenary administrative power over unallotted Indian lands and undistributed Indian funds. *Lone Wolf v. Hitchcock*, supra; *Winton v. Ames*, 255 U. S. 373; *United States v. Creek Nation*, 295 U. S. 110; *United States v. Mille Lac Band of Chippewas*, 229 U. S. 498; *Kadrie case*, supra.

In the case of *Cherokee Nation v. Hitchcock*, 187 U. S. 294, 308, the Supreme Court held:

[fol. 85] We are not concerned in this case with the question whether the act of June 28, 1898, and the proposed action thereunder, which is complained of, is or is not wise, and calculated to operate beneficially to the interests of the Cherokees. The power existing in Congress to administer upon and guard the tribal property, and the power being political and administrative in its nature, the manner of its exercise is a question within the province of the legislative branch to determine and is not one for the courts.

The established rule applies to the tribal funds of an Indian tribe or tribes whenever an existing Indian tribe challenges the administration of its estate under an act or acts of Congress.

The first claim of plaintiffs is for \$232,011.21. Section 7 of the act of 1889 provided that the Government should advance to the Indians each year after the passage of the act the sum of \$90,000, known as advance interest. These annual advancements were to continue until the permanent fund arising from the sale of surplus lands equalled or exceeded \$3,000,000, less any actual interest accruing in the meantime.

The Government made annual appropriations of \$90,000 in accord with the act for the fiscal years 1892 to 1911, inclusive, or a total sum of \$1,890,000. On May 16, 1911, reimbursement was taken by the Government as follows: \$896,246.93 from the permanent fund, and on later dates, \$973,504.52 from the interest fund, or a total reimbursement of \$1,869,751.45, resulting in a failure of the Government to obtain a full reimbursement of public money taken from the Treasury of \$177.94.

The plaintiffs insists that the Government in taking reimbursement for advanced interest payments took from the permanent fund \$232,011.21 more than the act of 1889 authorized. No contention is advanced that all the money involved was disbursed in any other way than for the exclusive benefit of the Indian tribe, nor is it contended that reimbursement for the sums appropriated by the Government was unauthorized, the only contention being that the permanent fund under the act of 1889 was depleted to the extent noted, to the prejudice of the remaindermen.

[fol. 86] The annual Indian appropriation bill for 1911 contained among other provisions the following:

For advance interest to the Chippewa Indians in Minnesota, as required by section seven, Act of January fourteenth, eighteen hundred and eighty-nine, entitled "An Act for the relief and civilization of the Chippewa Indians in the State of Minnesota," to be expended in the manner required by said Act, ninety thousand dollars: Provided, That the amount of this appropriation and all moneys heretofore or hereafter to be appropriated for this purpose shall be repaid into the Treasury of the United States in accordance with the provisions of the Act of January fourteenth, eighteen hundred and eighty-nine: Provided further, That the Secretary of the Treasury shall transmit to Congress on the first Monday in December, nineteen hundred and ten, a statement, by tribes and funds, of all moneys appropriated

by Congress since July first, eighteen hundred and seventy-five, required by law to be reimbursed to the United States from Indian tribal funds held in trust or otherwise, showing the extent to which such reimbursements have been, or may now be accomplished [36 Stat. 276].

The wording of this portion of the appropriation act discloses that Congress in its conception of its obligations under the act of 1889 appropriated each year the \$90,000 advance interest payment without respect to the interest fund accumulating upon the permanent fund from year to year. Obviously, if Congress had been aware of the extent of interest accumulations it could have omitted these advance appropriations at least eight years sooner.

While technically it may be asserted that Congress did not strictly observe the provisions of the act of 1889, it is indisputable that the present plaintiffs suffered absolutely no loss, and now seek to gain a benefit from a transaction which did them no harm whatever. The reason advanced by the Government is a weighty one. While advancements of interest were appropriated by the Government the sums advanced were not completely disbursed in any one fiscal year.

The bookkeeping system of the Treasury discloses two separate accounts—one known as payment into the permanent fund and the other into the interest fund—and in the addition of unexpended balances as well as the addition and subtraction of sums from the interest fund the Secretary [fol. 87] of the Interior made the reimbursements as he construed the act of 1889 to authorize. In the multitude of entries in a large and continuing account over a long term of years the Government is not to be charged with an error that results in no loss or damage to any living Indian.

The act of 1889 provided that from the proceeds of the sale of the ceded lands the Government should be reimbursed for carrying out the act. The plaintiffs do not challenge the amount the Government appropriated and disbursed for this purpose. The present item in suit is a claim for \$203.17, an alleged overreimbursement from the permanent fund.

In view of our judgment and opinion in this case, the defendant's defense to this item is invulnerable, and in no event was the reimbursement taken in excess of \$25.23. There were a number of appropriations made by Congress



for the benefit of the plaintiffs, in each of which it was expressly provided that the Government should be reimbursed therefor from the plaintiffs' funds. The act of 1889 contained certain provisions which obligated the Government to provide sufficient funds for administering the act, and for these sums the Government was to be reimbursed. Obviously, no additional legislation was required to authorize such reimbursements. The sums for which the Government took reimbursement, in addition to these, were appropriations made by Congress concerning the welfare and civilization of the tribe and providing that they should be reimbursed for the same.

The plaintiffs seek to limit this item to one expenditure for carrying out the act of 1889 and object to treating the reimbursable items as a whole. This position is untenable. Congress retained its plenary power and authority over Indian tribal lands and funds and provided that the sums appropriated were to be reimbursed from the Indian funds. See Finding 9.

The Government by appropriation acts appropriated \$19,782.50 for an Indian school at Leech Lake, Minnesota; \$30,453.79 for a drainage survey of ceded lands; \$35,000 for an Indian school at Red Lake, Minnesota, and \$17,974.54 for school buildings for the Chippewas of Minnesota. In each appropriation act it was expressly provided that the sums thus appropriated and disbursed should be reimbursed to [fol. 88] the Government out of the funds involved in this case. To hold that the act of 1889 precluded the Government from taking ample Indian funds of a tribe for the above civilizing purpose is contrary to established precedents.

In the discussion of items which are to follow it is not essential to enter into the details of accounting. The findings point out the sums involved, and we have adverted to typical items illustrative of all involved. As previously stated, the plaintiffs' case rests upon a lack of Congressional authority to take from the funds created by the act of 1889 any sum not expressly stated to be reimbursable. If this is the principle of established law, manifestly the plaintiffs are entitled to recover.

Aside from reimbursable sums mentioned in the act of 1889, additional items in suit involve reimbursement of large sums appropriated by Congress and expended for welfare and civilization of the tribe, which were either not

authorized by the act or exceeded the sums authorized. One item is education. The act of 1889 expressly authorized the expenditure of one-fourth of interest accumulations during the fifty-year period to be expended under the direction of the Secretary of the Interior for education. It is alleged and proved that more than one-fourth was expended, and subsequently the Government was reimbursed from the fund.

In the process of extending instrumentalities for obtaining an advancement of civilization, education becomes a leading and controlling factor. If Congress adopted the policy subsequent to 1889 of reimbursing appropriations made to Indian tribes for this purpose out of available Indian tribal funds, the courts may not intervene. The act of 1889 did not create a contract, and Congress did not by its enactment render the Government powerless to provide as in its wisdom it deemed appropriate for the education of the Indians. It retained control of unexpended tribal funds.

It is asserted that facilities for education inured to individual Indians and not to the tribe. It is unnecessary to combat the argument. *The Chickasaw Nation v. United States*, 87 C. Cls. 91. Agricultural implements, clothing for the needy, provisions and rations for the hungry, livestock, and food for their maintenance; fuel and light for [fol. 89] Indian homes; hospitals for the sick; funds for the burial of the dead, as well as innumerable other items restricted exclusively to the status of an Indian tribe, may, when Congress so prescribes, be paid for out of Indian tribal funds, irrespective of the provisions of the act of 1889.

In 1911 Congress adopted the policy of defraying the expense of Indian agencies and other costs of governmental activities in Indian affairs, either in whole or in part, out of available Indian tribal funds. In this case Congress observed this policy and provided that sums expended for this purpose should be reimbursable. The plaintiffs contest the item by a contention predicated upon governmental policy obtaining in former years. We will not review the origin and purpose of Indian agencies; it is sufficient to state that Congress determines the Indian policy and we may not challenge it.

Because Congress appropriated as it did between the years 1890 and 1910 the sum of \$2,350,559 for the relief and civilization of the Chippewa Indians of Minnesota and di-

rected that the Treasury should obtain reimbursement of this sum "out of the proceeds of sales of land ceded by the Chippewa Indians under the act of 1889, or out of the proceeds of the sale of their lands," it becomes incumbent upon the plaintiffs to establish a diversion of the funds to purposes other than the relief and civilization of the Indians.

The record to warrant a recovery must not conclude with a mere showing that the provisions of the act of 1889 were not strictly complied with. The act of 1889 in its preamble discloses its purpose, and assuredly Congress was not compelled to permit a large population of tribal Indians to stand in need of the facilities of relief and civilization, when the tribe itself possessed ample and sufficient funds to supply the same. Under plaintiffs' contention the status of the tribe remained in statu quo for at least a half century if Congress in the meantime had refused appropriations.

Per capita distributions were all made to the Indians from the funds in accord with the following acts of Congress: 39 Stat. 135; 42 Stat. 221; 43 Stat. 1; 43 Stat. 798; 44 Stat. 7. Manifestly it was essential to make them. Changing economic and social conditions obviously inspired the legislation which altered the provisions of the act of [fol. 90] 1889. The present generation of Indians, as well as many who have passed on, accepted these benefits and they were beneficial; and they did not then object that the so-called trust fund was being unlawfully depleted. It was not until after all these benefits had been fully realized by the tribe that solicitude was manifested for the designated remaindermen.

The plaintiffs contest an expenditure made by the Government for a drainage survey of ceded lands, and repeating the provisions of the act of 1889 point out that no provision is found therein authorizing this proceeding. It is, of course, true that no express provision authorizing the survey is found in the Act. It was accomplished under congressional authority, and what was done inured to the Indians.

The extent of the funds to be realized from the sale of surplus lands was dependent upon their classification. Swamp lands if susceptible to drainage would enhance in value, and what the Government did was for the express benefit of the tribe. To bring the swamp areas into a state

of cultivation was in direct accord with the intent of the act of 1889 which by express terms contemplated, if it did not express, an intent to bring the estate to the point of its greatest value.

Out of the fund arising from the act of 1889 there was expended from 1905 to 1927 the total sum of \$8,758,030.59. For the relief and civilization of the Indians for the years 1912 to 1927 the Interior Department expended approximately \$2,526,267.74, and the per capita distributions during this same period totaled \$5,684,341.60, a total disbursement of \$8,210,609.34 either authorized by acts of Congress or disbursed in accord with the provisions of the act of 1889.

The plaintiffs subtract \$8,210,609.34 from \$8,758,030.59, which leaves \$547,421.25, and upon this calculation insist that \$547,421.25 was taken from the Indian fund without any authority either from Congress or the provisions of the act of 1889. No charge is made that this sum was disbursed for any other purpose than for the tribe's benefit, and authority must exist for the disbursements made.

The defense, and it is a conclusive one, discloses, and the record sustains the fact, that the report of the Comptroller General shows in detail all expenditures made for the benefit of the tribe from 1905 to 1927, inclusive. During the same [fol. 91] period of time expenditures for the survey, allotment, and sale of the ceded lands totaled \$669,606.34, and were expressly authorized by the provisions of the act of 1889.

The \$8,210,609.34 represents expenditures authorized by acts of Congress and, to say the least, the could would not be warranted in holding that the \$547,421.25 was not part of the expenditures authorized by the act of 1889 and did not exact congressional authority. In other words, aside from what has been said, the record fails to establish the contention advanced with that degree of certainty required to warrant a judgment.

In the Kadrie case heretofore cited, this language is used in the opinion of the Supreme Court:

When the act of 1889 was passed the Chippewa Indians in Minnesota comprised eleven bands or tribes occupying ten distinct reservations in that state in virtue of treaties or Executive orders. Collectively, they were regarded as a single tribe and commonly called the Chippewas of Minnesota. They numbered about 8,300, and their reservations

contained approximately 4,700,000 acres. They were tribal Indians, under the guardianship of the United States, and held their reservations as tribal lands [p. 208].

Also, on page 221 of the same opinion, the court said:

The second question is more easily answered, for not only does the act of 1889 show very plainly that the purpose was to accomplish a gradual rather than an immediate transition from the tribal relation and dependent wardship to full emancipation and individual responsibility but Congress in *many later acts*—some near the time of the decision in question—has recognized the continued existence of the tribe. \* \* \* With the tribe still existing the criticism by counsel for the relators of the Secretary's decision in other particulars loses much of its force. [*Italics inserted.*]

To sustain the plaintiffs' contentions exacts a holding from this court that the act of 1889 accomplished an "immediate emancipation" of the plaintiff Indians, had the effect of dissolving the relationship of guardian and ward, and placed the Government in the position of being absolutely unable to administer their tribal affairs. This we can not do.

We regret the necessity for lengthy and involved findings of fact, but find no way to avoid them. If, however, we are [fol. 92] correct in holding the lands and funds to be tribal ones subject to the plenary power and authority of the Government over the same, the detailed accounting becomes immaterial.

The petition will be dismissed. It is so ordered.

Whaley, Judge; Williams, Judge; Littleton, Judge; and Green, Judge, concur.

#### SUPPLEMENTAL OPINION

BOOTH, Chief Justice, delivered the opinion of the court:

The plaintiffs and defendant file motions to amend the findings and for a new trial. The defendant's motion does not challenge the judgment or opinion of the court. It is confined to amendment of the findings to make some of them more positive and to clarify others. The plaintiffs' motion alleges both errors of fact and law and points out the same,



and while the judgment and opinion of the court are challenged, a request for a reargument of the case is not asked.

The plaintiffs contend that one of their principal claims had been inadequately disclosed in the court's findings, and additional findings are requested in order that the claim may be so stated as not to foreclose a presentation of the same in the event of a review of the court's judgment. The request is a reasonable one and it may be the court did not find in extenso with respect to the facts involved. We grant plaintiffs' motion in part and amend our findings accordingly.

Plaintiffs' contention with respect to per capita payments made to the Indians under the acts appended to this opinion is thus stated: "Disbursement of large portions of the principal fund, prior to the termination of the fifty-year trust period, to persons then in being, many of whom are now dead, and who, so far as still living, may or may not survive to the end of the trust period so as to be entitled to share in the final distribution of principal to 'all said Chipewewa Indians and their issue then living.'"

The Secretary of the Interior did, in accord with the acts of Congress attached hereto, make per capita distributions from the funds of the Indians in the Treasury to the amount of \$5,684,341.50 and manifestly this decreased to this extent the amount of the fund available for distribution at the end [of 93] of the fifty-year period. Hence the issue presented by the requested findings is identical with plaintiffs' contentions as to all claims preferred.

If a beneficiary under the acts received a per capita payment from the principal fund and thereafter died before the expiration of the fifty-year period there can be no doubt as to the financial consequences to the issue of the Indian at the end of the fifty-year period. The final result, so far as the distributees mentioned in the act of 1889 are concerned, is in no way obscure. That, however, is not the issue. If Congress determined to utilize the existing fund for a generation of tribal Indians who in their judgment needed it to ward off the hardships of life, and who were really the creators of the fund, it was a matter for Congress to determine and not the courts.

Congress did not arbitrarily or capriciously deplete the so-called trust fund in the payment of a per capita distribution. On the contrary, it submitted to the Indians the ques-

tion as to whether they wished or disapproved it: A referendum appeared in every act but one authorizing the same. Obviously, the response to the referendums indicated immediate necessities and displeasure with the prolonged period involved in the disposition of the Indian tribal fund.

It is manifestly beyond the jurisdiction of the court to express agreement or disagreement with the provisions of the act of 1889. Congress possesses the authority to care for tribal Indians, and, under established precedents we have cited, the courts may not question its discretion or the exercise of the plenary power they have of right. If the case is restricted to a matter of accounting under the act of 1889 the findings tell the story.

The plaintiffs say that they appear in this case under the special jurisdictional act for and on behalf of "all those entitled to share in the final distribution," meaning all those entitled to receive a share of the fund when the trust period has expired, and it is insisted that the damages suffered by this class occasioned in part by the per capita payments from the fund "are to be here redressed."

If the contention advanced is predicated upon the theory that the jurisdictional act creates rights and consequent liabilities, or by its terms recognizes existing rights under [fol. 94] the act of 1889, it is answered by the decision of the Supreme Court in the *Mille Lac Band of Chippewa Indians v. United States*, 229 U. S. 498, 500, wherein the following rule applicable to the construction of special jurisdictional acts was established:

The jurisdictional act makes no admission of liability, or of any ground of liability, on the part of the Government, but merely provides a forum for the adjudication of the claim according to applicable legal principles. Nor does it contemplate that recovery may be founded upon any merely moral obligation, not expressed in pertinent treaties or statutes, or upon any interpretation of either that fails to give effect to their plain import, because of any supposed injustice to the Indians. *United States v. Old Settlers*, 148 U. S. 427, 469; *United States v. Choctaw & Nations*, 179 U. S. 494, 735; *Sac and Fox Indians*, 220 U. S. 481, 489.

We find nothing in the record to sustain a finding that the per capita payments here involved were made to the then beneficiaries of interest distributions. The acts au-

thorizing the payments use the terms "permanent" and "principal fund." The sums distributed and the extent of the Indian enrollment negative the fact that the distribution and payments were limited to the interest fund. The variation in sums as to different years is attributable in part to the difference in the amount of per capita payments authorized by the acts.

If the per capita payments were authorized by the act of 1889 and were intended only for beneficiaries of the interest distributions the Secretary of the Interior did not need special legislation to make such distributions. The act of 1889 conferred such authority. The special acts are susceptible to but one construction in our opinion, and that is Congress intended and clearly expressed such an intention to take from available funds in the Treasury to the credit of the Indians and distribute designated amounts to them per capita irrespective of the source from which the fund emanated.

The taking of a receipt from each distributee was a precautionary measure adopted by the Secretary of the Interior in formulating his regulations. This procedure has, we think, nothing to do with the solution of the issues in this [fol. 95] case. The Secretary was authorized to administer and pay out a large sum of money and the maintenance of strict regulations involving accounting was indispensable. As a matter of fact, the regulations promulgated by the Secretary were in no way unusual.

Plaintiffs argue that notwithstanding per capita payments made to individual Indians who had died prior to June 30, 1927, and to others now living who may survive the trust period, the entire amount distributed under the special acts should be appropriated by Congress and restored to the so-called trust fund. As to the survivors, the defendant is fully protected by receipts, and as to decedents the payment was unauthorized.

If the judgment of the court is erroneous and plaintiffs' contention hereafter sustained, the above argument will become important; it is now a stated principle of accounting, and may become important in fixing the sum to be appropriated if this court is wrong in its adjudication of the case.

We have gone carefully into the record in considering the motions for a new trial, and we have added this opinion to the original one because the plaintiffs in the brief appar-

ently feel that we neglected both in the findings and opinion to attach to the subject-matter of per capita payments the importance it deserves. On page 37 of the original opinion in the first line of the second paragraph the word "reimbursable" will be stricken out.

Plaintiffs' request for a new Finding 23 is denied. The subject-matter of the finding involves a statement of existing laws concerning the public school system of Minnesota, a matter of which the courts take judicial notice.

The determinative issue in this case, deducible from the facts involved, depends as we see it upon the one important legal principle: If Congress in enacting the act of 1889 precluded a subsequent Congress from administering the act of 1889 in accord with the existing condition of tribal Indians, and by legislation diverted the fund established by prior legislation in the interest of those then in need of it, does legal precedent exact reimbursement to the fund of the sums expended? If Congress is without authority to care for the immediate needs of tribal Indians, and yet does so, is a legal liability imposed upon the United [fol. 96]. States to appropriate again sufficient funds to carry into effect the provisions of an act which by its terms would leave an existing Indian population in what Congress has determined to be a condition of distress and necessity? What we hold is that Congress possesses the exclusive and plenary authority to deal with tribal Indian lands and funds as in its wisdom it deems just. It is a matter within the exclusive jurisdiction of Congress, and if the legislation does not impair vested rights or appropriate Indian property for a public purpose the courts are absolutely without jurisdiction. *Lone Wolf v. Hitchcock*, 187 U. S. 553.

The motions for a new trial are overruled and the motions to amend the findings are allowed in part and overruled in part. The former findings are withdrawn, and amended findings this day filed, the judgment and former opinion to stand. It is so ordered.

Whaley, Judge; Littleton, Judge; and Green, Judge, concur.

Williams, Judge, took no part in this decision.

[fol. 97]

## APPENDIX

The act of May 18, 1916, 39 Stat. 123, 135, provides in part as follows:

That the Secretary of the Interior, under such rules and regulations as he may prescribe, is hereby authorized to advance to any individual Chippewa Indian in the State of Minnesota entitled to participate in the permanent fund of the Chippewa Indians of Minnesota one-fourth of the amount which would now be coming to said Indian under a pro rata distribution of said permanent fund: Provided, That the Secretary of the Interior, under such rules and regulations as he may prescribe, may use for or advance to any Chippewa Indian in the State of Minnesota entitled to share in said fund who is incompetent, blind, crippled, decrepit, or helpless from old age, disease, or accident, one-fourth of the amount which would now be coming to said Indian under a pro rata distribution of said permanent fund: Provided further, That any money received hereunder by any member of said tribe or used for his or her benefit shall be deducted from the share of said member in the permanent fund of the said Chippewa Indians in Minnesota to which he or she would be entitled: Provided further, That the funds hereunder to be paid to Indians shall not be subject to any lien or claim of attorneys or other third parties.

The act of November 19, 1921, 42 Stat. 221, provides as follows:

That the Secretary of the Interior be, and he is hereby, authorized to withdraw from the Treasury of the United States so much as may be necessary of the principal fund on deposit to the credit of the Chippewa Indians in the State of Minnesota, arising under section 7 of the act of January 14, 1889 (Twenty-fifth Statutes at Large, page 642), entitled "An Act for the relief and civilization of the Chippewa Indians in the State of Minnesota," and to make therefrom a per capita payment, or distribution, of \$100 to each enrolled member of the tribe, under such rules and regulations as the said Secretary may prescribe: Provided, That the money paid to the Indians as authorized herein shall not be subject to any lien or claim of attorneys or other parties: Provided, That before any payment is made hereunder the Chippewa Indians of Minnesota shall, in such manner as may be pre-



scribed by the Secretary of the Interior, ratify the provisions of this act and accept the same.

The act of January 25, 1924, 43 Stat. 1, provides as follows:

That the Secretary of the Interior be, and he is hereby, authorized to withdraw from the Treasury of the United States so much as may be necessary of the principal fund on deposit to the credit of the Chippewa Indians in the State of Minnesota, arising under section 7 of the Act of January 14, 1889 (Twenty-fifth Statutes at Large, 642), entitled "An Act for the relief and civilization of the Chippewa Indians in the State of Minnesota," and to make therefrom a per capita payment or distribution of \$100 to each enrolled member of the tribe, under such rules and regulations as the said Secretary may prescribe: Provided, That before any payment is made hereunder the Chippewa Indians of Minnesota shall, in such manner as may be prescribed by the Secretary of the Interior, ratify the provisions of this Act and accept same: Provided further, That the money paid to the Indians as authorized herein shall not be subject to any lien or claim of attorneys or other parties.

The act of January 30, 1925, 43 Stat. 798, provides as follows:

That the Secretary of the Interior be, and he is hereby, authorized to withdraw from the Treasury of the United States so much as may be necessary of the principal fund on deposit to the credit of the Chippewa Indians in the State of Minnesota, arising under section 7 of the Act of January 14, 1889 (Twenty-fifth Statutes at Large, 642), entitled "An Act for the relief and civilization of the Chippewa Indians in the State of Minnesota," and to make therefrom a per capita payment or distribution of \$50 to each enrolled member of the tribe, under such rules and regulations as the said Secretary may prescribe: Provided, That before any payment is made hereunder the Chippewa Indians of Minnesota shall, in such manner as may be prescribed by the Secretary of the Interior, ratify the provisions of this Act and accept same: Provided further, That the money paid to the Indians as authorized herein shall not be subject to any lien or claim of attorneys or other parties.

[fol. 99] The act of February 19, 1926, 44 Stat. 7, provides as follows:

That the Secretary of the Interior be, and he is hereby, authorized to withdraw from the Treasury of the United States so much as may be necessary of the principal fund on deposit to the credit of the Chippewa Indians in the State of Minnesota, arising under section 7 of the Act of January 14, 1889 (Twenty-fifth Statutes at Large, 642), entitled, "An Act for the relief and civilization of the Chippewa Indians in the State of Minnesota," and to make therefrom a per capita payment or distribution of \$50 to each enrolled member of the tribe, under such rules and regulations as the said Secretary may prescribe: Provided, That before any payment is made hereunder the Chippewa Indians of Minnesota shall, in such manner as may be prescribed by the Secretary of the Interior, ratify the provisions of this Act and accept same: Provided further, That the money paid to the Indians as authorized herein shall not be subject to any lien or claim of attorneys or other parties.

[fol. 100]

#### VII. JUDGMENT

At a Court of Claims held at the City of Washington on the 9th day of January, A. D. 1939, judgment was ordered to be entered as follows:

Upon the special findings of fact, which are made part of the judgment herein, the court decides as a conclusion of law that the plaintiffs are not entitled to recover.

It is Therefore Adjudged and Ordered that the plaintiffs' petition be and the same is hereby dismissed.

[fol. 101] VIII. PLAINTIFFS' PETITION FOR ALLOWANCE OF APPEAL UNDER JOINT RESOLUTION APPROVED JUNE 22, 1936  
—Filed January 20, 1939

To the Honorable the Chief Justice and Associate Justices of the Court of Claims of the United States:

The above named plaintiffs, the Chippewa Indians of Minnesota, conceiving themselves aggrieved by the judgment of this Court, entered on the 14th day of November, 1938, in

the above entitled cause, and, following the filing of "Motions for New Trial", affirmed January 9, 1939, do hereby except to said judgment and appeal therefrom to the Supreme Court of the United States, as authorized in the Joint Resolution approved June 22, 1936, entitled "Joint Resolution to carry out the intention of Congress with reference to the claims of the Chippewa Indians of Minnesota against the United States" (49 Stat. L., 1826-7), on the ground that the Court of Claims, in its determination of said cause erred in each of the respects indicated in the following assignments of error, to-wit:

## I

In holding that the class designated in the Act of January 14, 1889 (25 Stat. 642), and in each of the agreements entered into thereunder, as "all the Chippewa Indians in Minnesota" was not a new class, but was a formerly existing and recognized tribal organization previously known by that name.

## II

In holding that by assenting to the Act of January 14, 1889, and entering into agreements of cession for the uses and purposes expressed in that Act, the bands of Chippewa Indians in Minnesota "returned to a single tribal organization precisely as the same had existed before their recognition as separate bands".

## III

In holding that the mutual assent of the parties to the agreements entered into under the Act of January 14, 1889, did not create a contract.

## IV

In holding the permanent or principal fund created pursuant to the agreements entered into under the Act of January 14, 1889, and limited and defined in Section 7 of said Act, to be tribal fund subject to the plenary control of Congress over tribal property.

## V

In holding the rights of those entitled to share in the final distribution of said permanent fund to be tribal rights, subject to the plenary control of Congress over tribal property.

## VI

In holding that the amounts withdrawn from said permanent fund as payment or reimbursement for "the expense of defendant's Indian agencies, and other costs of governmental activities in Indian affairs" (Opinion p. 36) though admittedly unauthorized by any provision of the Act of January 14, 1889, constituted a disposition authorized under the plenary power of Congress, and that plaintiffs, though representing those entitled to share in the final [fol. 103] distribution of said fund, are therefore not entitled to recover on account of the diversion of said fund to such purposes.

## VII

In holding that amounts disbursed from said permanent fund in per capita cash payments to individuals, although admittedly unauthorized by any provision of the agreements made pursuant to the authority contained in said Act of January 14, 1889, constituted a disposition of said fund authorized under the plenary power of Congress, and that plaintiffs, though representing those entitled to share in the final distribution of said fund are therefore not entitled to recover on account of the diversion of the fund to this purpose.

## VIII

In holding that although defendant's officers in 1911 erroneously made unauthorized and excessive withdrawals from said permanent fund as reimbursement for payment of advance interest previously distributed to the then interest beneficiaries, those entitled to share in the final distribution of said permanent fund suffered no loss thereby, and that plaintiffs, although expressly including and representing said ultimate distributees are not entitled to recover therefor.

## IX

In holding that plaintiffs are not entitled to recover for the amount by which the total disbursements from said permanent fund under appropriations "for the purpose of promoting civilization and self support among said Indians" (Finding 15) exceeded a total of five per cent of said permanent fund. (Finding 13).

## X

In holding that amounts withdrawn by defendant from said permanent fund to reimburse itself for expenditures for the drainage of lands ceded by the agreements made under said Act of January 14, 1889, and for the erection of [fols. 104-108] school buildings (Findings 11 and 12) were so withdrawn in accordance with the implied purposes of that Act, and that plaintiffs are not entitled to recover therefor.

## XI

In holding that plaintiffs are not entitled to recover for amounts disbursed from said permanent fund for each of the purposes set forth in Finding 17.

## XII

In holding that the disbursement from said permanent fund of the sum of \$547,421.25 referred to in Finding 16, constituted a lawful disposition of said fund in accordance with said Act of January 14, 1889.

## XIII

In holding as a conclusion of law that plaintiffs are entitled to no recovery, and in directing that the petition be dismissed.

## XIV

In entering judgment dismissing plaintiffs' petition.

And plaintiffs pray that this appeal be allowed; that a true copy of the material parts of the record, proceedings and papers in said cause and upon which said judgment was based, duly authenticated under the hand and seal of the Clerk of this Court be transmitted to the Supreme Court of the United States, as provided by law, to the end that said judgment may be reversed and said cause remanded for further proceedings in accordance with the opinion of the Appellate Court.

Webster Ballinger, Washington, D. C., and Holmes,  
Mayall, Reavill & Neimeyer, Duluth, Minnesota,  
Attorneys for Petitioners.



# ALLOWANCE OF APPEAL

The foregoing application for appeal is hereby allowed this 24th day of January, 1939.

Fenton W. Booth, Chief Justice.

[fol. 109] Citation, in usual form, showing service on Robert H. Jackson, omitted in printing.

[fol. 110] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 111] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION  
AS TO PRINTING RECORD—Filed February 11, 1939

Come now appellants in the above entitled cause, and adopt as their Statement of Points upon which they intend to rely in support of their appeal, the Assignments of Error set out in their Petition for Allowance of Appeal, which forms a part of the Record, and state that the entire Record as certified to this Court from the Court of Claims, is necessary for the consideration thereof, and the printing thereof is requested.

Webster Ballinger, Washington, D. C.; Holmes, Mayall, Reavill & Neimeyer, Duluth, Minnesota, Attorneys for the Chippewa Indians of Minnesota, Appellants.

Service of the above and foregoing Points Upon Which Appellants Rely and Designation of Record to be Printed, accepted this 11th day of February, 1939.

Robert H. Jackson, Solicitor General.

[fol. 112] [File endorsement omitted.]

Endorsed on cover: File No. 43,151. Court of Claims. Term No. 666. Chippewa Indians of Minnesota, appellant, vs. The United States. Filed February 11, 1939. Term No. 666, O. T., 1938.

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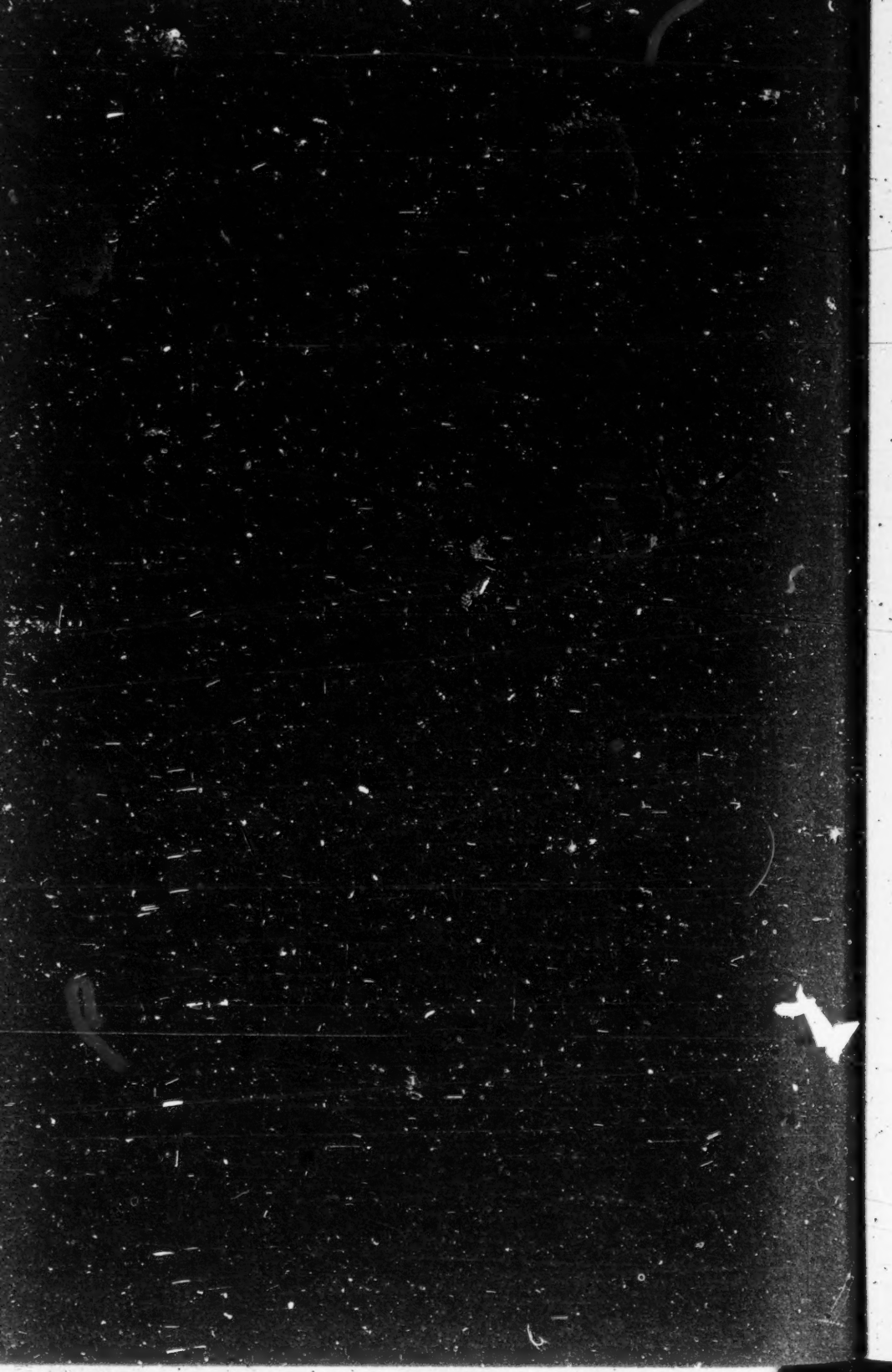
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IN THE  
COURT OF CLAIMS OF THE UNITED STATES

No. H-155.

CHIPPEWA INDIANS OF MINNESOTA,  
*Plaintiffs-Appellants,*  
*vs.*

THE UNITED STATES,  
*Defendant-Appellee.*

**STATEMENT AS TO JURISDICTION.**

(Filed January 20, 1939.)

In support of their application for the allowance of an appeal from the judgment entered in the above entitled cause, appellants above named, in compliance with Rule 12 of the Rules of the Supreme Court of the United States, file this statement of the basis upon which it is contended that said Supreme Court has jurisdiction, upon such appeal, to review the judgment in question.

The statutory provision believed to sustain such jurisdiction is the Joint Resolution of Congress approved June 22, 1936, entitled "Joint Resolution to carry out the intention of Congress with reference to the claims of the Chip-

pewa Indians of Minnesota against the United States" (49 Stat. at L. 1826-7), which is as follows:

"Whereas by the Special Jurisdictional Act approved May 14, 1926 (44 Stat. L. 555), the claims of the Chippewa Indians of Minnesota against the United States were referred to the Court of Claims 'with right of appeal to the Supreme Court of the United States by either party as in other cases', it being the intention that both parties should have the right of appeal to the Supreme Court; and

"Whereas the Supreme Court has since decided that notwithstanding such a provision there is no right of appeal, in view of the Judicial Code, as amended, unless the Jurisdictional Act specifically provides that the Supreme Court shall review a case on appeal, anything in the Judicial Code to the contrary notwithstanding: Now, therefore, be it

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the claims of the Chippewa Indians of Minnesota under the said Jurisdictional Act of May 14, 1926, shall be reviewed by the Supreme Court of the United States on appeal from the Court of Claims, anything in the Judicial Code, or amendments thereto, notwithstanding: Provided, That in any case heretofore decided by the Court of Claims said appeal shall be perfected by either party to the controversy within one year from the passage of this joint resolution, and an appeal shall be taken in all cases hereafter decided by the Court of Claims within three months from and after the date final judgment or decree is entered therein in the Court of Claims."

This suit was brought and prosecuted in the Court of Claims under the Special Jurisdictional Act approved May 14, 1926 (44 Stat. L. 555), referred to in said Joint Resolution. There is appended hereto a copy of the opinion delivered upon the rendering of the judgment sought to be reviewed, and supplemental opinion filed January 9, 1939,

which are the only opinions rendered in this case. No reference to any opinions in companion cases is necessary to ascertain the grounds of said judgment.

Jurisdiction in the Supreme Court to review said judgment upon appeal is believed to exist under the express language of said Joint Resolution, and does not depend upon any determination as to the validity of any State statute, or any statute or treaty of the United States.

The case of *Sisseton and Wahpeton Bands v. United States*, 277 U. S. 424, involving similar litigation and similar jurisdictional legislation, and the cases of *Chippewa Indians of Minnesota v. United States*, 301 U. S. 358, and *Chippewa Indians of Minnesota v. United States*, No. 244, decided January 3, 1939, in each of which the appeal was allowed and the case heard and decided by this Court under the same statutory authority here invoked, are each believed to fully sustain the jurisdiction claimed.

The date of the final judgment sought to be reviewed is January 9, 1939. The date of presentation of the application for an appeal is January 20, 1939.

WEBSTER BALLINGER,

*Washington, D. C.;*

HOLMES, MAYALL, REAVILL &

NEIMEYER,

*Duluth, Minnesota,*

*Attorneys for the Chippewa Indians  
of Minnesota, Plaintiffs-Appellants.*



**EXHIBIT "A".**

**Original Opinion Announced November 14, 1938.**

BOOTH, *Chief Justice*, delivered the opinion of the court:

The special jurisdictional act enabling the plaintiff Indians to sue in this court appears in Finding 1. The case grows out of alleged failure of the defendant to discharge its obligations under the act of January 14, 1889 (25 Stat. 642), and especially Sections 7 and 8 of that act. A judgment for a large sum of money is sought.

The act of January 14, 1889, has been several times before the Supreme Court. It is unnecessary to elaborate upon what the Supreme Court held to be its scope and purpose. It is sufficient for the purposes of this case to state that Congress in enacting the act clearly intended to put in effect the Government's prevailing Indian policy, *i. e.*, secure the dissolution of the various Indian Bands and Tribes involved, allot them lands in severalty, dispose of surplus lands for their benefit, and otherwise seek to civilize the Indians themselves. This act appears in Finding 4.

The plaintiff Indians assented to the provisions of the act of 1889, *supra*. The various bands ceded their lands in accord with the same. Allotments were made and accepted and the surplus lands, both timber and agricultural, were sold, accumulating a sum of money aggregating in excess of sixteen million dollars.

Inasmuch as the crucial issue in this case is more or less restricted to Sections 7 and 8 of the act of 1889, despite repetition, we insert at this point the provisions of the same, to wit:

Sec. 7. That all money accruing from the disposal of said lands in conformity with the provisions of this act shall, after deducting all the expenses of making the census, of obtaining the cession and relinquishment, of making the removal and allotments, and of completing the surveys and appraisals, in this act provided, be placed in the Treasury of the United States to the credit of all the Chippewa Indians in the State of Minnesota as a permanent fund, which shall draw interest at the

rate of five per centum per annum, payable annually for the period of fifty years, after the allotments provided for in this act have been made, and which interest and permanent fund shall be expended for the benefit of said Indians in manner following: One-half of said interest shall, during the said period of fifty years, except in the cases hereinafter otherwise provided, be annually paid in cash in equal shares to the heads of families and guardians of orphan minors for their use; and one-fourth of said interest shall, during the same period and with the like exception, be annually paid in cash in equal shares per capita to all other classes of said Indians; and the remaining one-fourth of said interest shall, during the said period of fifty years, under the direction of the Secretary of the Interior, be devoted exclusively to the establishment and maintenance of a system of free schools among said Indians, in their midst and for their benefit; and at the expiration of the said fifty years, the said permanent fund shall be divided and paid to all of said Chippewa Indians and their issue then living in cash, in equal shares: *Provided*, That Congress may, in its discretion, from time to time, during the said period of fifty years, appropriate, for the purpose of promoting civilization and self-support among the said Indians, a portion of said principal sum, not exceeding five per centum thereof. The United States shall, for the benefit of said Indians, advance to them as such interest as aforesaid the sum of ninety thousand dollars annually, counting from the time when the removal and allotments provided for in this act shall have been made, until such time as said permanent fund, exclusive of the deductions hereinbefore provided for, shall equal or exceed the sum of three million dollars, less any actual interest that may in the meantime accrue from accumulations of said permanent fund; the payments of such interest to be made yearly in advance, and, in the discretion of the Secretary of the Interior, may, as to three-fourths thereof, during the first five years be expended in procuring livestock, teams, farming implements, and seed for such of the Indians to the extent of their shares as are fit and

desire to engage in farming, but as to the rest, in cash; and whenever said permanent fund shall exceed the sum of three million dollars the United States shall be fully reimbursed out of such excess, for all the advances of interest made as herein contemplated and other expenses hereunder.

Sec. 8. That the sum of one hundred and fifty thousand dollars is hereby appropriated, or so much thereof as may be necessary, out of any money in the Treasury not otherwise appropriated, to pay for procuring the cession and relinquishment, making the census, surveys, appraisals, removal and allotments, and the first annual payment of interest herein contemplated and provided for, which money shall be expended under the direction of the Secretary of the Interior in conformity with the provisions of this act. A detailed statement of which expenses, except the interest aforesaid, shall be reported to Congress when the expenditures shall be completed [25 Stat. 645].

The plaintiff Indians contend that the provisions of these sections created a conventional trust and thereby precluded the defendant from disbursing any of the funds involved except in strict accord with the same, which is the equivalent of saying that in this instance the conceded authority of Congress over tribal Indian lands and funds does not obtain. The defendant not only failed to observe the terms of the trust but, on the contrary, has depleted the trust fund by various disbursements to the Indians. The amount thus disbursed is the amount of the judgment sought.

The record establishes the fact that the defendant has disbursed from the fund created by Sections 7 and 8 of the act of 1889. We say disbursed—perhaps we should say has reimbursed the Treasury from the fund to the extent of appropriations made by Congress and paid to the plaintiff Indians, Congress authorizing the reimbursement in most instances, for purposes not mentioned in the act of 1889 and contrary to the terms of the alleged trust agreement.

The act of 1889 is free from ambiguity. On the date of its enactment and subsequent approval it was the indisputable intent of Congress to conserve the tribal funds accruing

from the sale of the surplus lands as provided therein. Doubtless it was the belief of Congress that the income from the fund that was to be disbursed to the Indians annually during the fifty-year period would be sufficient, along with their individual landed estates, to maintain them, and at the same time would encourage the adoption of the ways of the Whites for themselves and future generations.

The total sum taken from the fund involved represents sums appropriated by Congress from public money which was paid directly to the Indians or for their benefit. The defendant in no way profited in doing what was done. It is not alleged and assuredly not established that the necessity for the appropriations made did not exist; hence, if the plaintiff Indians may recover all they claim, this court must hold that the fund was not a tribal one, and Congress in passing the act of 1889, surrendered its authority over Indian tribal funds and lands.

The twelve or thirteen bands of Chippewa Indians were tribal Indians. They held their reservations as tribal Indians. *Kadzie case*, 281 U. S. 206. True, some individual allotments had been made on certain reservations, but the greater acreage of their reservations was held and occupied as communal Indian lands. They were recognized by the defendant as tribal Indians, and the only possible distinction between the Chippewa Indians of Minnesota as a tribe and any other tribe of Indians was the division of the tribe into various bands. It was and is not now unusual to find a tribe of Indians made up of several bands who hold a reservation exclusive of other bands. This fact does not destroy the identity of the tribe as such or alter the character of the title by which their lands are held.

What was accomplished by the act of 1889 was a voluntary merger of all the tribal lands, participated in by all the bands of the Chippewa Tribe, and consummated by cessions of all the Chippewa bands. It was in effect, and resulted in, a resumption of a tribal unit, always known as the Chippewa Indians of Minnesota—an abandonment of band organization and a return to a single tribal one.

The plaintiff Indians insist that the act of 1889 created "a new class or entity" without tribal organization, possessing

no lands or other property, devoid of leadership, and in fact having none of the characteristics of an Indian band or tribe. To this contention we cannot assent. The bands did cede their separate reservations and agreed to take allotments on the Red Lake and White Earth Reservations, and thereafter participate upon an equal basis in the benefits to be derived from so doing. It was a transition from separate band organization to a unitary one, governed in precisely the same manner and under precisely the same laws applicable to the control and disposition of Indian lands by the Government.

The participants in this consolidation were all tribal Chippewa Indians. The lands ceded were tribal lands. The Indian bands surrendered whatever advantage they possessed because of band organization in the interest of their brethren, and agreed that all the Chippewa Indians in Minnesota, irrespective of bands, should take alike in the great Chippewa estate in Minnesota.

The fact that subsequent to the cession the ordinary Indian tribal organization in all its detail did not prevail is, we think, unimportant. Subsequent to the cession the lands were disposed of as communal Indian lands, the funds were recognized as also communal, and the entire administration of the Indian estate was conducted upon the basis of tribal lands and funds. The benefits to accrue from the same vested without discrimination in all the Chippewas of Minnesota. This was not the creation of a new class; it was simply the amalgamation of an old one.

Aside from all that has been said, it is of much more importance to give attention to the plaintiff's contention that the defendant surrendered its plenary authority over Indian tribal lands and funds when the act of 1889 was approved. The contention is a novel one. It is, of course, conceded that this power and authority exist. *Lone Wolf v. Hitchcock*, 187 U. S. 553.

The plaintiff Indians argue that because Congress lacked the power to take the land of one of the bands and give it to another, it therefore lacked the power to do what was done without the consent of the Indians, and thus surrendered its plenary power and authority over tribal Indian lands and funds. It is true Congress did not exert to the



limit the power and authority it possessed when the act of 1889 was approved, but this fact does not import its non-existence. The limitations of the power extend only to an impairment or destruction of vested rights. *Gritts v. Fisher*, 224 U. S. 640.

The lands and funds of the various bands of Indians were tribal and subject to the plenary power and authority of Congress. This fact is indisputable. Congress made annual appropriations for the bands and treated and recognized them as tribal. The Indians themselves made no claim to the contrary. When the Indians ceded the lands they transferred the title they possessed, and this transaction did not in any sense emancipate the Indians, render them *sui juris*, or dissolve the relationship of guardian and ward previously existing.

The act of 1889 expressly withholds from the Indians the administration of its provisions. Congress reserved the power and authority to administer it. Every provision of the law exhibits with positiveness the recognized inability of tribal Indians to adjust and settle this vast and valuable estate. Not a single provision of the act in any way imports either a willingness or intent to surrender the power and authority Congress possessed in the premises, or to abandon its traditional and legal authority to care for the welfare and civilization of tribal Indians.

It is true that the act of 1889 contained a referendum clause. It was not to become effective until approved by a certain number of the Indians and the President. This fact does not, however, change the established relationship of the defendant and the Indians. The mutual assent of the interested parties to the enactment of the act did not create a contract.

When Congress abandoned the policy of treating Indian Tribes as dependent nations with whom the Government made treaties respecting their tribal affairs, as it admittedly did in 1871, it assumed and has since then continuously exercised the power and authority to manage, control, regulate, and adjust tribal Indian affairs, including their lands and funds. The assumption of this plenary authority has been more than once approved by the Supreme Court. *Lone Wolf v. Hitchcock*, *supra*.

In the enactment of statutes similar to the act of 1889 designed to relieve and civilize Indian tribes, Congress did not intend to surrender this existing plenary power and authority if subsequent conditions exhibited an acute necessity to alter the terms of a pre-existing act so long as subsequent legislation did not take from the Indians vested rights. As to lands and funds remaining after the vesting of rights of property, and so long as the subsequent acts did not take from the tribe lands belonging to it and give them to strangers or appropriate them to the Government, the plenary power and authority of Congress over Indian tribal lands and funds exist.

The case of *Gritts v. Fisher*, *supra*, directly in point, negatives the contentions of the plaintiffs advanced in this case. The Supreme Court in deciding the above case said:

It is conceded, and properly so, that the later legislation is valid and controlling unless it impairs or destroys rights which the act of 1902 vested in members living September 1, 1902, and enrolled under that act. As has been indicated, their individual allotments are not affected. But it is said that the act of 1902 contemplated that they alone should receive allotments and be the participants in the distribution of the remaining lands, and also of the funds, of the tribe. No doubt such was the purport of the act. But that, in our opinion, did not confer upon them any vested right such as would disable Congress from thereafter making provision for admitting newly born members of the tribe to the allotment and distribution. The difficulty with the appellants' contention is that it treats the act of 1902 as a contract, when "it is only an act of Congress and can have no greater effect." *Cherokee Intermarriage Cases*, 203 U. S. 76, 93. It was but an exertion of the administrative control of the Government over the tribal property of tribal Indians, and was subject to change by Congress at any time before it was carried into effect and while the tribal relations continued. *Stephens v. Cherokee Nation*, 174 U. S. 445, 488; *Cherokee Nation v. Hitchcock*, 187 U. S. 294; *Wallace v. Adams*, 204 U. S. 415, 423. [224 U. S. 648.]

Section 74 of the act of 1902 (32 Stat. 716), the initiatory legislation subsequently changed by the act of April 26, 1906 (34 Stat. 137), as amended June 21, 1906 (34 Stat. 325, 340), involved in the *Gritts v. Fisher* case, *supra*, was submitted to the tribe for ratification. This section of the act of 1902 reads in part as follows:

This act shall not take effect or be of any validity until ratified by a majority of the whole number of votes cast by the legal voters of the Cherokee Nation in the manner following [32 Stat. 727].

The case of *Sizemore v. Brady*, 235 U. S. 441, involved the "original Creek Agreement." The issue raised was similar to the one in this case. It was contended by the plaintiff that the original agreement was a grant *in praesenti* and vested absolute rights to allotments of Indian lands, and that Congress was powerless to impair or alter the original agreement. In deciding adversely to this contention the court said:

On the part of the maternal cousins it is contended that the provisions in the original agreement, relating to the allotment and distribution of the tribal lands and funds were in the nature of a grant *in praesenti* and invested every living member of the tribe and the heirs, designated in the tribal laws, of every member who had died after April 1, 1899, with an absolute right to an allotment of lands and a distributive share of the funds, and that Congress could not recall or impair this right without violating the due process of law clause of the Fifth Amendment to the Constitution. To this we cannot assent. There was nothing in the agreement indicative of a purpose to make a grant *in praesenti*. On the contrary, it contemplated that various preliminary acts were to precede any investiture of individual rights. The lands and funds to which it related were tribal property and only as it was carried into effect were individual claims to be fastened upon them. Unless and until that was done Congress possessed plenary power to deal with them as tribal prop-

erty. It could revoke the agreement and abandon the purpose to distribute them in severalty, or adopt another mode of distribution, or pursue any other course which to it seemed better for the Indians. And without doubt it could confine the allotment and distribution to living members of the tribe or make any provision deemed more reasonable than the first for passing to the relatives of deceased members the lands and money to which the latter would be entitled, if living. In short, the power of Congress was not exhausted or restrained by the adoption of the original agreement, but remained the same thereafter as before, save that rights created by carrying the agreement into effect could not be divested or impaired. *Choate v. Trapp*, 224 U. S. 665, 671 [235 U. S. 449, 450].

We need not go back and discuss either the necessity of each individual band of Chippewas assenting to the passage of the act of 1889, or whether as a legal proposition the estate of all the bands might have been adjusted and finally settled by the exertion of the plenary power and authority of Congress. It seems to us of little consequence to the solution of the issues presented by the record. We know what the individual bands did. We know that as tribal Indians they accepted all the benefits accruing to them under the act of 1889 and in accord with its terms. We know that they approved the act of 1889, and whatever may have been their rights under separate band organization we know they voluntarily surrendered them to acquire others under the act of 1889.

What we intend to hold and what we think the record sustains is that "About the beginning of the last century the Chippewas constituted one of the larger Indian tribes in the northerly part of the United States. In early treaties they were dealt with as a single tribe and were shown to be occupying a large area reaching from Lake Huron on the east to and beyond Lake Superior on the west. In later treaties they were regarded as divided into distinct bands; and particular bands—in some instances a single band and in others a limited plurality of bands—were recog-

nized as occupying separate areas in Michigan, Wisconsin, Minnesota, and eastern Dakota, and as entitled to hold or cede the same independently of other bands and of the Chippewas as a whole." *Chippewa Indians v. United States*, 301 U. S. 358, 360, 361.

The various bands acting independently did cede their tribal lands to the United States; pooled, as it were, all the Chippewa Indian lands in Minnesota previously held by individual bands, and by so doing rendered them the communal Indian lands of all the Chippewa Indians of Minnesota. The bands by assenting to the act of 1889 returned to a single tribal organization precisely as the same had existed before their recognition as separate bands.

If Congress intended in 1889 to create a new Indian entity possessing characteristics wholly different from a tribal one, endowed with legal authority to receive the benefits of the sale and disposition of tribal lands and funds free from the control and authority of Congress, it is the first time in the history of Indian legislation that this has been done. It was, indeed, a wide and unusual departure from the established Indian policy of the Government. It is clear to us that Congress did not so intend.

The contentions of the plaintiffs as we understand them concern exclusively the rights of the Chippewa Indians of Minnesota and their issue living on the date stated in the act of 1889 for the distribution of the so-called trust fund. This must be so, for the Chippewa Indians of Minnesota now living and those who survived the enactment of the act of 1889 have participated in and received the monetary benefits brought about by the Government's legislation which depleted the fund, and in no way have suffered loss or damage.

In other words, the present members of the Chippewa Indians of Minnesota cannot have a complaint, and if the plaintiffs are to recover for the designated "remaindermen" they will have received not only the benefits of the so-called trust fund during all these years but the Government will be required to duplicate the distribution to their heirs at the end of the fifty-year period. This conclusion we think is inescapable.



We have considered with care the numerous cases cited in the briefs of counsel and are absolutely unable to find one which holds that under an act of Congress providing for the settlement of Indian tribal estates a succeeding Congress is powerless to alter a former act, when after the enactment of the first act the succeeding one deems it essential for the good of the tribe to exercise its plenary administrative power over unallotted Indian lands and undistributed Indian funds. *Lone Wolf v. Hitchcock*, *supra*; *Winton v. Amos*, 255 U. S. 373; *United States v. Creek Nation*, 295 U. S. 110; *United States v. Mille Lac Band of Chippewas*, 229 U. S. 498; *Kadrie case*, *supra*.

In the case of *Cherokee Nation v. Hitchcock*, 187 U. S. 294, 308, the Supreme Court held:

We are not concerned in this case with the question whether the act of June 28, 1898, and the proposed action thereunder, which is complained of, is or is not wise, and calculated to operate beneficially to the interests of the Cherokees. The power existing in Congress to administer upon and guard the tribal property, and the power being political and administrative in its nature, the manner of its exercise is a question within the province of the legislative branch to determine and is not one for the courts.

The established rule applies to the tribal funds of an Indian tribe or tribes whenever an existing Indian tribe challenges the administration of its estate under an act or acts of Congress.

The first claim of plaintiffs is for \$232,011.21. Section 7 of the act of 1889 provided that the Government should advance to the Indians each year after the passage of the act the sum of \$90,000, known as advance interest. These annual advancements were to continue until the permanent fund arising from the sale of surplus lands equalled or exceeded \$3,000,000, less any actual interest accruing in the meantime.

The Government made annual appropriations of \$90,000 in accord with the act for the fiscal years 1892 to 1911, inclusive, or a total sum of \$1,890,000. On May 16, 1911, reim-

bursement was taken by the Government as follows: \$896,246.93 from the permanent fund, and on later dates, \$973,504.52 from the interest fund, or a total reimbursement of \$1,869,751.45, resulting in a failure of the Government to obtain a full reimbursement of public money taken from the Treasury of \$177.94.

The plaintiffs insist that the Government in taking reimbursement for advanced interest payments took from the permanent fund \$232,011.21 more than the act of 1889 authorized. No contention is advanced that all the money involved was disbursed in any other way than for the exclusive benefit of the Indian tribe, nor is it contended that reimbursement for the sums appropriated by the Government was unauthorized, the only contention being that the permanent fund under the act of 1889 was depleted to the extent noted, to the prejudice of the remaindermen.

The annual Indian appropriation bill for 1911 contained among other provisions the following:

For advance interest to the Chippewa Indians in Minnesota, as required by section seven, Act of January fourteenth, eighteen hundred and eighty-nine, entitled "An Act for the relief and civilization of the Chippewa Indians in the State of Minnesota," to be expended in the manner required by said Act, ninety thousand dollars: *Provided*, That the amount of this appropriation and all moneys heretofore or hereafter to be appropriated for this purpose shall be repaid into the Treasury of the United States in accordance with the provisions of the Act of January fourteenth, eighteen hundred and eighty-nine: *Provided further*, That the Secretary of the Treasury shall transmit to Congress on the first Monday in December, nineteen hundred and ten, a statement, by tribes and funds, of all moneys appropriated by Congress since July first, eighteen hundred and seventy-five, required by law to be reimbursed to the United States from Indian tribal funds held in trust or otherwise, showing the extent to which such reimbursements have been, or may now be accomplished [36 Stat. 276].

The wording of this portion of the appropriation act discloses that Congress in its conception of its obligations under the act of 1889 appropriated each year the \$90,000 advance interest payment without respect to the interest fund accumulating upon the permanent fund from year to year. Obviously, if Congress had been aware of the extent of interest accumulations it could have omitted these advance appropriations at least eight years sooner.

While technically it may be asserted that Congress did not strictly observe the provisions of the act of 1889, it is indisputable that the present plaintiffs suffered absolutely no loss, and now seek to gain a benefit from a transaction which did them no harm whatever. The reason advanced by the Government is a weighty one. While advancements of interest were appropriated by the Government the sums advanced were not completely disbursed in any one fiscal year.

The bookkeeping system of the Treasury discloses two separate accounts—one known as payment into the permanent fund and the other into the interest fund—and in the addition of unexpended balances as well as the addition and subtraction of sums from the interest fund the Secretary of the Interior made the reimbursements as he construed the act of 1889 to authorize. In the multitude of entries in a large and continuing account over a long term of years the Government is not to be charged with an error that results in no loss or damage to any living Indian.

The act of 1889 provided that from the proceeds of the sale of the ceded lands the Government should be reimbursed for carrying out the act. The plaintiffs do not challenge the amount the Government appropriated and disbursed for this purpose. The present item in suit is a claim for \$203.17, an alleged overreimbursement from the permanent fund.

In view of our judgment and opinion in this case, the defendant's defense to this item is invulnerable, and in no event was the reimbursement taken in excess of \$25.23. ~~There were~~ a number of appropriations made by Congress for the benefit of the plaintiffs, in each of which it was expressly provided that the Government should be reimbursed therefor from the plaintiffs' funds. The act of 1889 con-

tained certain provisions which obligated the Government to provide sufficient funds for administering the act, and for these sums the Government was to be reimbursed. Obviously, no additional legislation was required to authorize such reimbursements. The sums for which the Government took reimbursement, in addition to these, were appropriations made by Congress concerning the welfare and civilization of the tribe and providing that they should be reimbursed for the same.

The plaintiffs seek to limit this item to one expenditure for carrying out the act of 1889 and object to treating the reimbursable items as a whole. This position is untenable. Congress retained its plenary power and authority over Indian tribal lands and funds and provided that the sums appropriated were to be reimbursed from the Indian funds. See Finding 9.

The Government by appropriation acts appropriated \$19,782.50 for an Indian school at Leech Lake, Minnesota; \$30,453.79 for a drainage survey of ceded lands; \$35,000 for an Indian school at Red Lake, Minnesota, and \$17,974.54 for school buildings for the Chippewas of Minnesota. In each appropriation act it was expressly provided that the sums thus appropriated and disbursed should be reimbursed to the Government out of the funds involved in this case. To hold that the act of 1889 precluded the Government from taking ample Indian funds of a tribe for the above civilizing purpose is contrary to established precedents.

In the discussion of items which are to follow it is not essential to enter into the details of accounting. The findings point out the sums involved, and we have adverted to typical items illustrative of all involved. As previously stated, the plaintiffs' case rests upon a lack of Congressional authority to take from the funds created by the act of 1889 any sum not expressly stated to be reimbursable. If this is the principle of established law, manifestly the plaintiffs are entitled to recover.

Aside from reimbursable sums mentioned in the act of 1889, additional items in suit involve reimbursement of large sums appropriated by Congress and expended for welfare and civilization of the tribe, which were either not au-

thorized by the act or exceeded the sums authorized. One item is education. The act of 1889 expressly authorized the expenditure of one-fourth of interest accumulations during the fifty-year period to be expended under the direction of the Secretary of the Interior for education. It is alleged and proved that more than one-fourth was expended, and subsequently the Government was reimbursed from the fund.

In the process of extending instrumentalities for obtaining an advancement of civilization, education becomes a leading and controlling factor. If Congress adopted the policy subsequent to 1889 of reimbursing appropriations made to Indian tribes for this purpose out of available Indian tribal funds, the courts may not intervene. The act of 1889 did not create a contract, and Congress did not by its enactment render the Government powerless to provide as in its wisdom it deemed appropriate for the education of the Indians. It retained control of unexpended tribal funds.

It is asserted that facilities for education inured to individual Indians and not to the tribe. It is unnecessary to combat the argument. *The Chickasaw Nation v. United States*, 87 C. Cls. 91. Agricultural implements, clothing for the needy, provisions and rations for the hungry, livestock, and food for their maintenance; fuel and light for Indian homes; hospitals for the sick; funds for the burial of the dead, as well as innumerable other items restricted exclusively to the status of an Indian tribe, may, when Congress so prescribes, be paid for out of Indian tribal funds, irrespective of the provisions of the act of 1889.

In 1911 Congress adopted the policy of defraying the expense of Indian agencies and other costs of governmental activities in Indian affairs, either in whole or in part, out of available Indian tribal funds. In this case Congress observed this policy and provided that sums expended for this purpose should be reimbursable. The plaintiffs contest the item by a contention predicated upon governmental policy obtaining in former years. We will not review the origin and purpose of Indian agencies; it is sufficient to state that Congress determines the Indian policy and we may not challenge it.



Because Congress appropriated as it did between the years 1890 and 1910 the sum of \$2,350,559 for the relief and civilization of the Chippewa Indians of Minnesota and directed that the Treasury should obtain reimbursement of this sum "out of the proceeds of sales of land ceded by the Chippewa Indians under the act of 1889, or out of the proceeds of the sale of their lands," it becomes incumbent upon the plaintiffs to establish a diversion of the funds to purposes other than the relief and civilization of the Indians.

The record to warrant a recovery must not conclude with a mere showing that the provisions of the act of 1889 were not strictly complied with. The act of 1889 in its preamble discloses its purpose, and assuredly Congress was not compelled to permit a large population of tribal Indians to stand in need of the facilities of relief and civilization, when the tribe itself possessed ample and sufficient funds to supply the same. Under plaintiffs' contention the status of the tribe remained *in statu quo* for at least a half century if Congress in the meantime had refused appropriations.

Per capita distributions were all made to the Indians from the funds in accord with the following acts of Congress: 39 Stat. 135; 42 Stat. 221; 43 Stat. 1; 43 Stat. 798; 44 Stat. 7. Manifestly it was essential to make them. Changing economic and social conditions obviously inspired the legislation which altered the provisions of the act of 1889. The present generation of Indians, as well as many who have passed on, accepted these benefits and *they were* beneficial, and they did not then object that the so-called trust fund was being unlawfully depleted. It was not until after all these benefits had been fully realized by the tribe that solicitude was manifested for the designated remaindermen.

The plaintiffs contest an expenditure made by the Government for a drainage survey of ceded lands, and repeating the provisions of the act of 1889 point out that no provision is found therein authorizing this proceeding. It is, of course, true that no express provision authorizing the survey is found in the act. It was accomplished under

Congressional authority, and what was done inured to the Indians.

The extent of the funds to be realized from the sale of surplus lands was dependent upon their classification. Swamp lands if susceptible to drainage would enhance in value, and what the Government did was for the express benefit of the tribe. To bring the swamp areas into a state of cultivation was in direct accord with the intent of the act of 1889 which by express terms contemplated, if it did not express, an intent to bring the estate to the point of its greatest value.

Out of the fund arising from the act of 1889 there was expended from 1905 to 1927 the total sum of \$8,758,030.59. For the relief and civilization of the Indians for the years 1912 to 1927 the Interior Department expended approximately \$2,526,267.74, and the per capita distributions during this same period totaled \$5,684,341.60, a total disbursement of \$8,210,609.34 either authorized by acts of Congress or disbursed in accord with the provisions of the act of 1889.

The plaintiffs subtract \$8,210,609.34 from \$8,758,030.59, which leaves \$547,421.25, and upon this calculation insist that \$547,421.25 was taken from the Indian fund without any authority either from Congress or the provisions of the act of 1889. No charge is made that this sum was disbursed for any other purpose than for the tribe's benefit, and authority must exist for the disbursements made.

The defense, and it is a conclusive one, discloses, and the record sustains the fact, that the report of the Comptroller General shows in detail all expenditures made for the benefit of the tribe from 1905 to 1927, inclusive. During the same period of time expenditures for the survey, allotment, and sale of the ceded lands totaled \$669,606.34, and were expressly authorized by the provisions of the act of 1889.

The \$8,210,609.34 represents expenditures authorized by acts of Congress and, to say the least, the court would not be warranted in holding that the \$547,421.25 was not part of the expenditures authorized by the act of 1889 and did not exact Congressional authority. In other words, aside from what has been said, the record fails to establish the contention advanced with that degree of certainty required to warrant a judgment.

In the *Kadzie* case heretofore cited, this language is used in the opinion of the Supreme Court:

When the act of 1889 was passed the Chippewa Indians in Minnesota comprised eleven bands or tribes occupying ten distinct reservations in that State in virtue of treaties or Executive orders. Collectively, they were regarded as a single tribe and commonly called the Chippewas of Minnesota. They numbered about 8,300, and their reservations contained approximately 4,700,000 acres. They were tribal Indians, under the guardianship of the United States, and held their reservations as tribal lands [p. 208.]

Also, on page 221 of the same opinion, the court said:

The second question is more easily answered, for not only does the act of 1889 show very plainly that the purpose was to accomplish a gradual rather than an immediate transition from the tribal relation and dependent wardship to full emancipation and individual responsibility but Congress in *many later acts*—some near the time of the decision in question—has recognized the continued existence of the tribe. \* \* \* With the tribe still existing the criticism by counsel for the relators of the Secretary's decision in other particulars loses much of its force. [Italics inserted.]

To sustain the plaintiffs' contentions exacts a holding from this court that the act of 1889 accomplished an "immediate emancipation" of the plaintiff Indians, had the effect of dissolving the relationship of guardian and ward, and placed the Government in the position of being absolutely unable to administer their tribal affairs. "This we can not do."

We regret the necessity for lengthy and involved findings of fact, but find no way to avoid them. If, however, we are correct in holding the lands and funds to be tribal ones subject to the plenary power and authority of the Government over the same, the detailed accounting becomes immaterial.

The petition will be dismissed. It is so ordered.

Whaley, *Judge*; Williams, *Judge*; Littleton, *Judge*; and Green, *Judge*, concur.

### Supplemental Opinion.

BOOTH, *Chief Justice*, delivered the opinion of the court:

The plaintiffs and defendant file motions to amend the findings and for a new trial. The defendant's motion does not challenge the judgment or opinion of the court. It is confined to amendment of the findings to make some of them more positive and to clarify others. The plaintiffs' motion alleges both errors of fact and law and points out the same, and while the judgment and opinion of the court are challenged, a request for a reargument of the case is not asked.

The plaintiffs contend that one of their principal claims has been inadequately disclosed in the court's findings, and additional findings are requested in order that the claim may be so stated as not to foreclose a presentation of the same in the event of a review of the court's judgment. The request is a reasonable one and it may be the court did not find *in extenso* with respect to the facts involved. We grant plaintiffs' motion in part and amend our findings accordingly.

Plaintiffs' contention with respect to per capita payments made to the Indians under the acts appended to this opinion is thus stated: "Disbursement of large portions of the principal fund, prior to the termination of the fifty-year trust period, to persons then in being, many of whom are now dead, and who, so far as still living, may or may not survive to the end of the trust period so as to be entitled to share in the final distribution of principal to 'all said Chippewa Indians and their issue then living'."

The Secretary of the Interior did, in accord with the acts of Congress attached hereto, make per capita distributions from the funds of the Indians in the Treasury to the amount of \$5,684,341.50 and manifestly this decreased to this extent the amount of the fund available for distribution at the end of the fifty-year period. Hence the issue presented by the requested findings is identical with plaintiffs' contentions as to all claims preferred.

If a beneficiary under the acts received a per capita payment from the principal fund and thereafter died before

the expiration of the fifty-year period there can be no doubt as to the financial consequences to the issue of the Indian at the end of the fifty-year period. The final result, so far as the distributees mentioned in the act of 1889 are concerned, is in no way obscure. That, however, is not the issue. If Congress determined to utilize the existing fund for a generation of tribal Indians who in their judgment needed it to ward off the hardships of life, and who were really the creators of the fund, it was a matter for Congress to determine and not the courts.

Congress did not arbitrarily or capriciously deplete the so-called trust fund in the payment of a per capita distribution. On the contrary, it submitted to the Indians the question as to whether they wished or disapproved it. A referendum appeared in every act but one authorizing the same. Obviously, the response to the referendums indicated immediate necessities and displeasure with the prolonged period involved in the disposition of the Indian tribal fund.

It is manifestly beyond the jurisdiction of the court to express agreement or disagreement with the provisions of the act of 1889. Congress possesses the authority to care for tribal Indians, and, under established precedents we have cited, the courts may not question its discretion or the exercise of the plenary power they have of right. If the case is restricted to a matter of accounting under the act of 1889, the findings tell the story.

The plaintiffs say that they appear in this case under the special jurisdictional act for and on behalf of "all those entitled to share in the final distribution," meaning all those entitled to receive a share of the fund when the trust period has expired, and it is insisted that the damages suffered by this class occasioned in part by the per capita payments from the fund "are to be here redressed."

If the contention advanced is predicated upon the theory that the jurisdictional act creates rights and consequent liabilities, or by its terms recognizes existing rights under the act of 1889, it is answered by the decision of the Supreme Court in the *Mille Lac Band of Chippewa Indians v. United States*, 229 U. S. 498, 500, wherein the following rule appli-



cable to the construction of special jurisdictional acts was established:

The jurisdictional act makes no admission of liability, or of any ground of liability, on the part of the Government, but merely provides a forum for the adjudication of the claim according to applicable legal principles. Nor does it contemplate that recovery may be founded upon any merely moral obligation, not expressed in pertinent treaties or statutes, or upon any interpretation of either that fails to give effect to their plain import, because of any supposed injustice to the Indians. *United States v. Old Settlers*, 148 U. S. 427, 469; *United States v. Choctaw &c. Nations*, 179 U. S. 494, 735; *Sac and Fox Indians*, 220 U. S. 481, 489.

We find nothing in the record to sustain a finding that the per capita payments here involved were made to the then beneficiaries of interest distributions. The acts authorizing the payments use the terms "permanent" and "principal fund." The sums distributed and the extent of the Indian enrollment negate the fact that the distribution and payments were limited to the interest fund. The variation in sums as to different years is attributable in part to the difference in the amount of per capita payments authorized by the acts.

If the per capita payments were authorized by the act of 1889 and were intended only for beneficiaries of the interest distributions the Secretary of the Interior did not need special legislation to make such distributions. The act of 1889 conferred such authority. The special acts are susceptible to but one construction in our opinion, and that is Congress intended and clearly expressed such an intention to take from available funds in the Treasury to the credit of the Indians and distribute designated amounts to them per capita irrespective of the source from which the fund emanated.

The taking of a receipt from each distributee was a precautionary measure adopted by the Secretary of the Interior in formulating his regulations. This procedure has, we think, nothing to do with the solution of the issues in this

case. The Secretary was authorized to administer and pay out a large sum of money and the maintenance of strict regulations involving accounting was indispensable. As a matter of fact, the regulations promulgated by the Secretary were in no way unusual.

Plaintiffs argue that notwithstanding per capita payments made to individual Indians who had died prior to June 30, 1927, and to others now living who may survive the trust period, the entire amount distributed under the special acts should be appropriated by Congress and restored to the so-called trust fund. As to the survivors, the defendant is fully protected by receipts, and as to decedents the payment was unauthorized.

If the judgment of the court is erroneous and plaintiffs' contention hereafter sustained, the above argument will become important; it is now a stated principle of accounting, and may become important in fixing the sum to be appropriated if this court is wrong in its adjudication of the case.

We have gone carefully into the record in considering the motions for a new trial, and we have added this opinion to the original one because the plaintiffs in the brief apparently feel that we neglected both in the findings and opinion to attach to the subject-matter of per capita payments the importance it deserves. On page 37 of the original opinion in the first line of the second paragraph the word "reimbursable" will be stricken out.

Plaintiffs' request for a new Finding 23 is denied. The subject-matter the finding involves a statement of existing laws concerning the public school system of Minnesota, a matter of which the courts take judicial notice.

The determinative issue in this case, deducible from the facts involved, depends as we see it upon the one important legal principle: If Congress in enacting the act of 1889 precluded a subsequent Congress from administering the act of 1889 in accord with the existing condition of tribal Indians, and by legislation diverted the fund established by prior legislation in the interest of those then in need of it, does legal precedent exact a reimbursement to the fund of the sums expended? If Congress is without authority to

care for the immediate needs of tribal Indians, and yet does so, is a legal liability imposed upon the United States to appropriate again sufficient funds to carry into effect the provisions of an act which by its terms would leave an existing Indian population in what Congress has determined to be a condition of distress and necessity? What we hold is that Congress possesses the exclusive and plenary authority to deal with tribal Indian lands and funds as in its wisdom it deems just. It is a matter within the exclusive jurisdiction of Congress, and if the legislation does not impair vested rights or appropriate Indian property for a public purpose the courts are absolutely without jurisdiction. *Lone Wolf v. Hitchcock*, 187 U. S. 553.

The motions for a new trial are overruled and the motions to amend the findings are allowed in part and overruled in part. The former findings are withdrawn, and amended findings this day filed, the judgment and former opinion to stand. It is so ordered.

Whaley, *Judge*; Littleton, *Judge*; and Green, *Judge*, concur.

Williams, *Judge*, took no part in this decision.

A true copy. Test:

\_\_\_\_\_  
Chief Clerk, Court of Claims  
of the United States.

### Appendix.

The act of May 18, 1916, 39 Stat. 123, 135, provides in part as follows:—

That the Secretary of the Interior, under such rules and regulations as he may prescribe, is hereby authorized to advance to any individual Chippewa Indian in the State of Minnesota entitled to participate in the permanent fund of the Chippewa Indians of Minnesota one-fourth of the amount which would now be coming to said Indian under a pro rata distribution of said permanent fund: *Provided*, That the Secretary of the Interior, under such rules and regulations as he may prescribe, may use for or advance to any Chippewa Indian in the State of Minnesota entitled to share in said fund who is incompetent, blind, crippled, decrepit, or helpless from old age, disease, or accident, one-fourth of the amount which would now be coming to said Indian under a pro rata distribution of said permanent fund: *Provided further*, That any money received hereunder by any member of said tribe or used for his or her benefit shall be deducted from the share of said member in the permanent fund of the said Chippewa Indians in Minnesota to which he or she would be entitled: *Provided further*, That the funds hereunder to be paid to Indians shall not be subject to any lien or claim of attorneys or other third parties.

The act of November 19, 1921, 42 Stat. 221, provides as follows:

That the Secretary of the Interior be, and he is hereby, authorized to withdraw from the Treasury of the United States so much as may be necessary of the principal fund on deposit to the credit of the Chippewa Indians in the State of Minnesota, arising under section 7 of the act of January 14, 1889 (Twenty-fifth Statutes at Large, page 642), entitled "An Act for the relief and civilization of the Chippewa Indians in the State of Minnesota," and to make therefrom a per cap-

ita payment, or distribution, of \$100 to each enrolled member of the tribe, under such rules and regulations as the said Secretary may prescribe: *Provided*, That the money paid to the Indians as authorized herein shall not be subject to any lien or claim of attorneys or other parties: *Provided*, That before any payment is made hereunder the Chippewa Indians of Minnesota shall, in such manner as may be prescribed by the Secretary of the Interior, ratify the provisions of this act and accept the same.

The act of January 25, 1924, 43 Stat. 1, provides as follows:

That the Secretary of the Interior be, and he is hereby authorized to withdraw from the Treasury of the United States so much as may be necessary of the principal fund on deposit to the credit of the Chippewa Indians in the State of Minnesota, arising under section 7 of the Act of January 14, 1889 (Twenty-fifth Statutes at Large, 642), entitled "An Act for the relief and civilization of the Chippewa Indians in the State of Minnesota," and to make therefrom a per capita payment or distribution of \$100 to each enrolled member of the tribe, under such rules and regulations as the said Secretary may prescribe: *Provided*, That before any payment is made hereunder the Chippewa Indians of Minnesota shall, in such manner as may be prescribed by the Secretary of the Interior, ratify the provisions of this Act and accept same: *Provided further*, That the money paid to the Indians as authorized herein shall not be subject to any lien or claim of attorneys or other parties.

The act of January 30, 1925, 43 Stat. 798, provides as follows:

That the Secretary of the Interior be, and he is hereby, authorized to withdraw from the Treasury of the United States so much as may be necessary of the principal fund on deposit to the credit of the Chippewa Indians in the State of Minnesota, arising under sec-



tion 7 of the Act of January 14, 1889 (Twenty-fifth Statutes at Large, 642), entitled "An Act for the relief and civilization of the Chippewa Indians in the State of Minnesota," and to make therefrom a per capita payment or distribution of \$50 to each enrolled member of the tribe, under such rules and regulations as the said Secretary may prescribe: *Provided*, That before any payment is made hereunder the Chippewa Indians of Minnesota shall, in such manner as may be prescribed by the Secretary of the Interior, ratify the provisions of this Act and accept same: *Provided further*, That the money paid to the Indians as authorized herein shall not be subject to any lien or claim of attorneys or other parties.

The act of February 19, 1926, 44 Stat. 7, provides as follows:

That the Secretary of the Interior be, and he is hereby, authorized to withdraw from the Treasury of the United States so much as may be necessary of the principal fund on deposit to the credit of the Chippewa Indians in the State of Minnesota, arising under section 7 of the Act of January 14, 1889 (Twenty-fifth Statutes at Large, 642), entitled, "An Act for the relief and civilization of the Chippewa Indians in the State of Minnesota," and to make therefrom a per capita payment or distribution of \$50 to each enrolled member of the tribe, under such rules and regulations as the said Secretary may prescribe: *Provided*, That before any payment is made hereunder the Chippewa Indians of Minnesota shall, in such manner as may be prescribed by the Secretary of the Interior, ratify the provisions of this Act and accept same: *Provided further*, That the money paid to the Indians as authorized herein shall not be subject to any lien or claim of attorneys or other parties.



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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1938

No. 666

THE CHIPPEWA INDIANS OF MINNESOTA,

*Appellants,*

vs.

THE UNITED STATES.

*Appellee.*

**BRIEF FOR APPELLANTS**

HOLMES, MAYALL, REAVILL & NEIMEYER,

*Duluth, Minnesota,*

WEBSTER BALLINGER,

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1938

No. 666

THE CHIPPEWA INDIANS OF MINNESOTA,

*Appellants,*

vs.

THE UNITED STATES,

*Appellee.*

**BRIEF FOR APPELLANTS**

**Opinions Below.**

The opinions of the Court of Claims in this case have not been officially reported. The original opinion, announced November 14, 1938, appears in the record at page 56. The supplemental opinion disposing of the motions for new trial made by each of the parties, announced January 9, 1939, appears in the record at page 72.

**Jurisdiction.**

The grounds upon which the jurisdiction of this court is invoked are set out in appellants' Jurisdictional Statement filed herein under Rule 12 of this court, heretofore printed.

Jurisdiction was conferred by the Special Jurisdictional Act of June 22, 1936 (49 Stat. at L. 1826). The judgment of the Court of Claims appealed from became final January 9, 1939 (R. 79). The appeal was allowed by the Chief Justice of the Court of Claims January 24, 1939 (R. 83). Probable jurisdiction was noted by this court March 6, 1939.

## STATEMENT OF THE CASE

### The Questions Presented.

The statement of the facts shown by the record will be more significant if preceded by a brief statement of the nature of the issues involved.

In this action appellants, who were plaintiffs in the court below, seek to recover from the United States amounts claimed to have been wrongfully diverted by the United States from the permanent or principal trust fund defined in Section 7 of the Act of January 14, 1889 (25 Stat. 642), and established by the express terms of the agreements entered into pursuant to that Act. This trust fund represents the proceeds of the disposal by the United States of the Indian lands ceded by those agreements. Under the terms of the Act and agreements it was to be a "permanent fund" distributable at the end of the trust period to a class defined as "said Chippewa Indians and their issue then living" in equal shares.

As will appear more fully in the discussion of the Special Jurisdictional Act conferring jurisdiction on the Court of Claims to hear and determine the claims in suit (*infra*), appellants are clearly authorized to maintain suits for any damage sustained by this class of ultimate distributees by reason of any unlawful diminution of this "permanent fund."

since a specific amendment of the Jurisdictional Act provides that in this litigation appellants, "the Chippewa Indians of Minnesota," shall be "considered as representing and including *all those entitled to share in the final distribution of the permanent fund* provided for by Section 7 of the Act of January 14, 1889" (Finding 1, R. 34).

It is without dispute in the record, and the findings of the Court of Claims show affirmatively, that large sums were withdrawn by defendant from the principal trust fund in question, for purposes wholly unauthorized by any provision of the agreements entered into under the Act of January 14, 1889. With certain exceptions, these diversions of the trust fund were made pursuant to Acts of Congress which purported to authorize them, and the Court of Claims, though recognizing that these disbursements were in violation of the trust as originally defined and agreed to, denied recovery upon the stated ground that the principal fund in question *constituted tribal property subject to the plenary power of Congress*, and that therefore no recovery might be had. As to certain other withdrawals and disbursements made by defendant's officers without authority of specific Acts of Congress, the court held that the same were authorized and proper under the terms of the Act of January 14, 1889, itself.

The correctness of these conclusions is the matter at issue here.

## The Jurisdictional Act and the Proceedings in the Court of Claims.

This suit is brought pursuant to authority granted by a Special Jurisdictional Act approved May 14, 1926 (44 Stat. 555), and amended by the Acts of April 11, 1928 (45 Stat. 423), and June 18, 1934 (48 Stat. 979). The material portions of the Jurisdictional Act as so amended appear in Finding No. 1 (R. 33-4). Section 1 as so amended and so far as here material reads:

"Sec. 1. That jurisdiction be, and is hereby, conferred upon the Court of Claims, with right of appeal to the Supreme Court of the United States by either party as in other cases, notwithstanding the lapse of time or statute of limitations, to hear, examine, and adjudicate and render judgment in any and all legal and equitable claims arising under or growing out of the Act of January 14, 1889 (25 Stat. L. 642), or arising under or growing out of any subsequent Act of Congress in relation to Indian Affairs which said Chippewa Indians of Minnesota may have against the United States; which claims have not heretofore been determined and adjudicated on their merits by the Court of Claims or the Supreme Court of the United States. *In any such suit or suits the plaintiffs, the Chippewa Indians of Minnesota, shall be considered as including and representing all those entitled to share in the final distribution of the permanent fund provided for by Section 7 of the Act of January 14, 1889 (25 Stat. L. 642), and the agreements entered into thereunder.* \* \* \*

The last and italicized sentence in the above quotation was added to the Jurisdictional Act by the Act of June 18, 1934 (*supra*).



Section 4 of the Jurisdictional Act, so far as here material, reads as follows (R. 34-5) :

"Sec. 4. If it be determined by the court that the United States, in violation of the terms and provision of any law, treaty, or agreement as provided in Section 1 hereof, has unlawfully appropriated or disposed of any money or other property belonging to the Indians, damages therefor shall be confined to the value of the money or other property at the time of such appropriation or disposal, together with interest thereon, at 5 per centum per annum from the date thereof. \* \* \*"

Section 10 of the Jurisdictional Act (R. 5) makes the following provision as to the disposition of any amounts recovered :

"Sec. 10. The proceeds of all amounts, if any, recovered for said Indians shall be deposited in the Treasury of the United States to the credit of the Indians decreed by said court to be entitled thereto, and shall draw interest at the rate of 5 per centum per annum from the date of the judgment or decree."

Appellants filed their original petition in this case in the Court of Claims on April 13, 1927, and thereafter on August 18, 1930, by leave of court filed their amended petition. On September 27, 1930, defendant answered by a general traverse. A second amended petition was filed August 22, 1935, to which defendant also filed a general traverse (Finding 2, R. 35).

The case came on for hearing on the merits and was argued and submitted. On November 14, 1938, the court filed its special findings of fact and decision directing the dismissal of the petition. Motions for amended findings and for new

trial having been filed by both parties, the court on January 9, 1939, filed its amended special findings of fact (R. 33) followed by its conclusion of law that the petition be dismissed (R. 56). Appended to these amended findings was the original opinion of November 14, 1938, (R. 56), and a new supplemental opinion (R. 72), disposing of the motions for new trial, and directing that the original opinion and judgment should stand.

From the judgment so entered this appeal is taken.

### **The Indian Titles Preceding the Act of January 14, 1889.**

At the time of the passage and approval of the Act of January 14, 1889, and for a long time prior thereto, the various bands or tribes of Chippewa Indians then located in Minnesota resided on twelve reservations in that state as to which the Indian title had not been extinguished (Finding 3, R. 35).

The Indian band, or bands, occupying each separate reservation were recognized and dealt with as having a separate and complete Indian title to the lands therein to the exclusion of all the other bands, who had no right to share therein, or to participate in the proceeds thereof (*Chippewa Indians of Minnesota vs. United States*, 301 U. S. 358, at 360-1).

These bands then located in Minnesota were part of the great Chippewa tribe which ranged, without regard to state boundaries, over Michigan, Wisconsin, Minnesota and the Dakotas. Thus the Court of Claims says (R. 64):

"What we intend to hold and what we think the record sustains is that 'About the beginning of the last century the Chippewas constituted one of the larger Indian tribes in the northerly part of the United States. In early treaties they were dealt with as a single tribe

and were shown to be occupying a large area reaching from Lake Huron on the East to and beyond Lake Superior on the West. In later treaties they were regarded as divided into distinct bands; and particular bands—in some instances a single band and in others a limited plurality of bands—were recognized as occupying separate areas in Michigan, Wisconsin, Minnesota, and eastern Dakota, and as entitled to hold or cede the same independently of other bands and of the Chippewas as a whole.' *Chippewa Indians vs. United States*, 301 U. S. 358, 360, 361."

This was the situation when the Act of January 14, 1889, was adopted.

#### **The Act of January 14, 1889, and the Agreements of Cession.**

The Act of January 14, 1889 (25 Stat. 642), appears in full in Finding No. 4 (R. 35 to 42). By that Act the President was authorized to designate commissioners to negotiate with "all the different bands of Chippewa Indians in Minnesota" for the complete cession and relinquishment of their title and interest in all their reservations (except so much of the White Earth and Red Lake Reservations as was required to make and fill the contemplated allotments).

The cessions so to be procured were to be "for the purposes and upon the terms hereinafter stated." Provision was made for allotments in severalty, the Act contemplating the allotment of the Red Lake Indians on the Red Lake reservation and the removal of the bulk of all the other Chippewa Indians to the White Earth reservation, to be there allotted. All lands not required for allotment were to be disposed of by the General Land Office, the timber lands to be sold to

the highest bidder as provided in Section 5, and the agricultural lands to be disposed of to settlers under the Homestead Law as provided in Section 6 of the Act. The proceeds were to be placed in the Treasury of the United States to the credit of all the Chippewa Indians in the State of Minnesota.

The provisions with regard to the disposal of the funds resulting from the sale of the ceded lands are embraced in Section 7 of the Act (R. 40), and were summarized with brevity and precision by this court in *Chippewa Indians of Minnesota vs. United States*, 301 U. S. 358, 364, as follows:

"As provided in Sec. 7 of the Act, all money accruing from the disposal of the ceded lands, after deducting enumerated expenses, was to be placed in the Treasury of the United States to the credit of '*all the Chippewa Indians in the State of Minnesota as a permanent interest bearing fund*' for the period of fifty years. The interest was to be used for the support and education of such Indians, and at the end of the fifty years the permanent fund was to be divided and paid to '*all of said Chippewa Indians and their issue then living*' in cash and equal shares, subject to a reserved power in Congress to make limited appropriations from the fund during the fifty year period for the purpose of promoting civilization and self-support among these Indians."

The provision referred to by the court as to the use of the interest "for the support and education of the Indians" provided, in substance, for the expenditure of one-fourth of such interest for a system of free schools among the Indians and for the distribution of all of the balance of interest annually in equal per capita payments to "said Indians."

The "reserved power in Congress to make limited appro-

*priations from the fund,*" referred to by the court, is that set forth in the proviso to Section 7, as follows:

"Provided, that Congress may, in its discretion, from time to time, during the said period of fifty years, appropriate, for the purpose of promoting civilization and self-support among the said Indians, a portion of said principal sum, not exceeding five per centum thereof."

The "*enumerated expenses*" authorized to be deducted from the proceeds of the lands included only the government's "*expenses hereunder*" (*i. e.*, expenses involved in carrying out the Act). Specifically described in said Section 7 as so deductible are the expenses of (1) making the required census of each band; (2) obtaining the cessions; (3) effecting the removal and allotments; and (4) completing the surveys and appraisals of the ceded lands. One further deduction or reimbursement for the fund was authorized by Section 7 (R. 41); *i. e.*, the defendant was authorized to reimburse itself when the fund reached \$3,000,000 for "all the advances of interest made as herein contemplated." The advances of interest are provided for in the same section, *i. e.*, "the sum of \$90,000 annually \* \* \* less any interest that may in the meantime accrue from accumulations of said permanent fund."

Except for these specified purposes, *i. e.* (1) the payment of defendant's expenses in carrying out the Act, (2) the disbursement of not more than five per cent of the fund for "promoting self-support and civilization" under what the court termed a "reserved power in Congress to make limited appropriations," and (3) reimbursement for interest advanced "as herein contemplated," neither the Act of January 14, 1889, or the agreements entered into thereunder contemplated or authorized the expenditure of a dollar of the



"permanent fund" for any purpose whatever, until the final distribution.

As authorized by the Act, the President appointed commissioners who met with all the different bands or tribes of Chippewa Indians in Minnesota, and after holding numerous council meetings, concluded agreements of cession with each and all of the different bands, for the uses and purposes expressed in the Act of January 14, 1889. That Act was embodied in each of the agreements either verbatim or by express reference, and each agreement recited that the Act had been read, interpreted and thoroughly explained to the understanding of the Indians, who consented and agreed to the Act and accepted and ratified the same. Each agreement expressly provided that the lands in question were ceded "for the purposes and on the terms" stated in the Act. These agreements of cession were, on March 4, 1890, accepted and approved by the President, and thereupon, under the express language of the Act, became effective (Finding 5, R. 42).

#### **The Administration of the Trust and the Ground of the Decision Below.**

Defendant proceeded with the disposal of the ceded lands, and established in the Treasury an interest-bearing principal fund designated as "Chippewas in Minnesota Fund" which was the "permanent fund" provided for by Section 7 of the Act of January 14, 1889, and in which the proceeds of the disposal of the ceded lands were placed as received. There was further established in the Treasury a separate non-interest bearing fund, designated as "Interest on Chippewas in Minnesota Fund," to which was credited interest at the rate of five per cent per annum on the principal fund.

and from which the annual distributions of interest were made (Finding 6, R. 43).

As shown by the findings of fact, defendant's principal withdrawals and disbursements from the principal fund to June 30, 1927, may be classified as follows:

(a) \$896,246.93 withdrawn as reimbursement to defendant for amounts appropriated as advance interest (Findings 7 and 8, R. 43-4).

(b) \$2,338,828.49 withdrawn as reimbursement for expenditures made under appropriations by Congress "To enable the Secretary of the Interior to carry out an Act entitled 'An Act for the relief and civilization of the Chippewa Indians in Minnesota, approved January 14, 1889'" (Findings 9 and 10, R. 45-7).

(c) \$2,526,267.74 disbursed directly from the principal fund under appropriations of Congress for "promoting civilization and self support" among the Indians (Finding 15, R. 49).

(d) \$547,421.25 disbursed directly from the principal fund on the theory that such disbursements were authorized by the Act of January 14, 1889, and without further appropriation by Congress (Finding 16, R. 50).

(e) \$5,684,341.50 disbursed directly from the principal fund in per capita payments to individuals made from the fund under Acts of Congress (Findings 21, 22, 23, R. 54-5).

The court below held all of said expenditures lawful. Appellants, suing as representatives of those entitled to share in the ultimate distribution of the "permanent fund," assert that a large part of such expenditures were in fact for purposes and in amounts wholly unauthorized by the Act of 1889 and the agreements made thereunder, and hence

unlawfully reduced the fund remaining for distribution. The nature and amount of these claims appear from the findings, which show:

(a) That during the years 1891-1896, inclusive (the only years when the interest actually accruing did not, in fact, exceed \$90,000 per year), the interest actually advanced exceeded the interest "in the meantime accruing from accumulations of said permanent fund" by only \$664,236.02. As a result, by invading the principal fund for reimbursement in the sum of \$896,246.93, defendant appropriated from the fund \$232,010.91 in excess of the amount contemplated by the provisions of Section 7 of the Act of January 14, 1889 (Finding 7, R. 43).

(b) That included in the expenditures made under appropriations to enable the Secretary of the Interior to carry out the Act of 1889, and for which defendant was reimbursed out of the "permanent fund," was only \$328,163.95 expended for purposes connected with carrying out that Act (i. e., for the expenses of the commission appointed to conduct the negotiations, make the census, conclude the agreements of cession, and supervise the allotments under the Act; for surveying, examining, appraising, allotting and sale of lands; for removals; for transportation; for councils and delegations, etc.), while \$2,010,461.37 was expended for purposes wholly foreign to the Act (Findings 9 and 10, R. 45 to 47), including over \$1,000,000 for "education" (which was to have been provided for out of the interest fund), and substantial amounts (more than \$300,000) for the expense of maintaining and housing defendant's Indian service (Finding 10, R. 46).

(c) That the total of all receipts at any time credited to the permanent fund was \$17,662,325.70 (Finding 13, R.

47). Congress reserved the power to appropriate a total of not more than five per cent of the "permanent fund" for "promoting civilization and self support." The total disbursed from the "permanent fund," under appropriations for this purpose, was \$2,526,267.74 (Finding 15, R. 49).

(d) A total of \$2,311,493.19 was disbursed from the permanent fund under Acts of Congress, for the purposes listed in Finding 17 (R. 51). The court of claims itself characterizes these expenditures as "other than amounts disbursed for purposes authorized by the Act of January 14, 1889." This characterization is justified. The total includes \$439,000 for "education," and additional payments of over \$180,000 to the Minnesota school system, and approximately \$500,000 for the expenses of defendant's Indian agencies.

(e) The further sum of \$547,421.25 was disbursed directly from the Chippewa fund without any specific appropriation by Congress solely under authority of the Act of January 14, 1889 (Finding 16, R. 50). The sole authority given by that act for expenditures directly from the fund is the provision of Section 7 (R. 40) authorizing the "deduction" of the expenses of (1) making the census, (2) obtaining the cession and relinquishment, (3) making the removals and allotments, and (4) completing the surveys and appraisals. There is no authority for any deduction or charge to the Indians for the expenses of the sale of the ceded lands, which under Sections 5 and 6 of the Act (R. 39-40) was to be conducted by the Land Office, nor was there any authority for the separate sale of timber. The court finds that this sum of \$547,421.25 is part of the sum of \$669,606.34 expended for "surveying, allotting, sale, etc., of lands; expenses, care and sale of timber; removals; trans-

portation of supplies; councils and delegations; examining and appraising land, as more fully set out hereafter" (Finding 16, R. 50). The exact makeup of this item of \$669,606.34 appears in Finding 19 (R. 53) as follows:

"Expenses surveying, allotting sale, etc., of lands .....	\$ 18,762.69
<i>Expenses, care and sale of timber</i> .....	531,484.43
Removals .....	942.04
Transportation of supplies .....	36,924.26
Councils and delegations .....	63,411.67
Examining and appraising land .....	18,081.25

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\$669,606.34"

It will be noted that of the total \$531,484.43 for "care and sale of timber" is not included in the purposes for which expense deductions were authorized. The Court of Claims disposes of this situation with the bare statement (R. 71) that "Expenditures for the survey, allotment and sale of ceded lands totalled \$669,606.34, and were expressly authorized by the provisions of the Act of January 14, 1889."

(f) There is no claim ~~that the per capita distributions from the permanent fund (\$5,684,341.56) had any justification in any provision of the Act of January 14, 1889, or the agreements, and they are rested solely on the various later acts authorizing them (R. 77), and the plenary power of Congress over tribal property.~~

As to such of these disbursements as were made pursuant to Acts of Congress, the Court of Claims said (R. 58) (*italics ours*):

"The defendant not only failed to observe the terms of the trust but, on the contrary, has depleted the trust fund by various disbursements to the Indians. The



amount thus disbursed is the amount of the judgment sought.

"The record establishes the fact that the defendant has disbursed from the fund created by Sections 7 and 8 of the act of 1889. We say disbursed—perhaps we should say has reimbursed the Treasury from the fund to the extent of appropriations made by Congress and paid to the plaintiff Indians, Congress authorizing the reimbursement in most instances, *for purposes not mentioned in the act of 1889 and contrary to the terms of the alleged trust agreement.*"

These disbursements are justified by the court and recovery is denied solely upon the ground that this was a tribal fund, subject to the plenary power of Congress. Thus, the lower court said (Supplemental Opinion, R. 73) :

"If Congress determined to utilize the existing fund for a generation of tribal Indians who in their judgment needed it to ward off the hardships of life, and who were really the creators of the fund, it was a matter for Congress to determine and not the courts."

The item of \$47,421.25 discussed under paragraph (c), *supra*, was disposed of by the Court of Claims on the ground there stated.

As to the excessive withdrawals from principal taken by the defendant in reimbursement for interest advances discussed under paragraph (a) above, the Court of Claims said (R. 67) :

"The wording of this portion of the appropriation act discloses that Congress in its conception of its obligations under the act of 1889 appropriated each year the \$90,000 advance interest payment without respect to

the interest fund accumulating upon the permanent fund from year to year. Obviously, if Congress had been aware of the extent of interest accumulations it could have omitted these advance appropriations at least eight years sooner.

"While technically it may be asserted that Congress did not strictly observe the provisions of the act of 1889, it is indisputable that the present plaintiffs suffered absolutely no loss."

#### **Finding No. 20; Offsets.**

Finding No. 20 (R. 54) reads as follows:

"20. During the period January 14, 1889, to June 30, 1934, the United States expended out of its public funds for the use and benefit of the Chippewa Indians of Minnesota the sum of \$5,065,878.95; no part of which sum has been reimbursed to the United States."

This finding has no direct bearing on any of plaintiffs' claims. Section 3 of the Special Jurisdictional Act (R. 34) provided that "gratuities, if any, paid to or expended for said Indians subsequent to January 14, 1889, might be pleaded as offsets in actions brought under the authority of the Act." Although no offsets were pleaded, defendant contended below that expenditures aggregating \$5,065,878.95 constituted proper offsets under this provision.

Substantially all of this claim was contested by plaintiffs. The total included amounts expended in the performance of treaty obligations; an amount appropriated as payment to the Indians for swamplands agreed to be included in reservations but in fact patented to the state; amounts expended for buildings which at all times have been, and still

remain, the unrestricted property of the government; amounts expended for such governmental purposes as the enforcement of the liquor laws; allocations on a percentage basis of the cost of operating non-reservation Indian schools, and similar items. Appellants contended that a major part of these expenditures were not proper offsets, because they were either (1) not gratuities, but amounts expended in the performance of defendant's treaty and other obligations; or (2) not "paid to or expended for" the Indians. Having found that plaintiffs were not entitled to recover, the court below made no determination of the issues thus raised, and in its original decision filed November 14, 1938, made no finding whatever on this subject.

The United States, in its motion for a new trial, requested a finding on this subject, stating:

"The purposes of this requested amendment are, in the event of an appeal, (1) to advise the Supreme Court that the United States has expended gratuitously large sums for the plaintiff Indians which the defendant would be entitled to offset, and (2) in the event of rulings adverse to defendant, by the Supreme Court, to avoid the possibility of a mandate foreclosing the Court of Claims from giving further consideration to, and applying, all proper offsets."

The Court of Claims refused to include in the finding a statement requested by defendant that the amounts claimed had been expended gratuitously "under no obligation to do so," and as the finding now stands, it merely shows a total expenditure, whether pursuant to treaty or other obligations or otherwise, of said \$5,065,878.95. It further appears that this total expenditure includes amounts expended up to June 30, 1934, thus including as offsets claims accruing

seven years after this suit was started, and seven years after the last date covered by the General Accounting Office Report upon which plaintiffs' claims are based.

The question of what part, if any, of the expenditures so made constitute "gratuities paid to or expended for said Indians," subject to offset under the Act, will be for determination by the Court of Claims upon a retrial, and appellants concede that the mandate should not foreclose such a consideration.

### ASSIGNMENTS OF ERROR

Appellants rely upon and intend to urge as ground for reversal each of the errors assigned in the petition for allowance of this appeal (R. 79), and accordingly here assign as error that the Court of Claims erred in each of the following respects:

#### I.

In holding that the class designated in the Act of January 14, 1889 (25 Stat. 642), and in each of the agreements entered into thereunder, as "all the Chippewa Indians in Minnesota" was not a new class, but was a formerly existing and recognized tribal organization previously known by that name.

#### II.

In holding that by assenting to the Act of January 14, 1889, and entering into agreements of cession for the uses and purposes expressed in that Act, the bands of Chippewa Indians in Minnesota "returned to a single tribal organization precisely as the same had existed before their recognition as separate bands."

## III.

In holding that the mutual assent of the parties to the agreements entered into under the Act of January 14, 1889, did not create a contract.

## IV.

In holding the permanent or principal fund created pursuant to the agreements entered into under the Act of January 14, 1889, and limited and defined in Section 7 of said Act, to be a tribal fund subject to the plenary control of Congress over tribal property.

## V.

In holding the rights of those entitled to share in the final distribution of said permanent fund to be tribal rights, subject to the plenary control of Congress over tribal property.

## VI.

In holding that the amounts withdrawn from said permanent fund as payment or reimbursement for "the expense of defendant's Indian agencies, and other costs of governmental activities in Indian affairs" (Opinion p. 36) though admittedly unauthorized by any provision of the Act of January 14, 1889, constituted a disposition authorized under the plenary power of Congress, and that plaintiffs, though representing those entitled to share in the final distribution of said fund, are therefore not entitled to recover on account of the diversion of said fund to such purposes.



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## VII.

In holding that amounts disbursed from said permanent fund in per capita cash payments to individuals, although admittedly unauthorized by any provision of the agreements made pursuant to the authority contained in said Act of January 14, 1889, constituted a disposition of said fund authorized under the plenary power of Congress, and that plaintiffs, though representing those entitled to share in the final distribution of said fund are therefore not entitled to recover on account of the diversion of the fund to this purpose.

## VIII.

In holding that although defendant's officers in 1911 erroneously made unauthorized and excessive withdrawals from said permanent fund as reimbursement for payment of advance interest previously distributed to the then interest beneficiaries, those entitled to share in the final distribution of said permanent fund suffered no loss thereby, and that plaintiffs, although expressly including and representing said ultimate distributees are not entitled to recover therefor.

## IX.

In holding that plaintiffs are not entitled to recover for the amount by which the total disbursements from said permanent fund under appropriations "for the purpose of promoting civilization and self support among said Indians" (Finding 15) exceeded a total of five per cent of said permanent fund (Finding 13).

## X.

In holding that amounts withdrawn by defendant from said permanent fund to reimburse itself for expenditures for the drainage of lands ceded by the agreements made under said Act of January 14, 1889, and for the erection of school buildings (Findings 11 and 12) were so withdrawn in accordance with the implied purposes of that Act, and that plaintiffs are not entitled to recover therefor.

## XI.

In holding that plaintiffs are not entitled to recover for amounts disbursed from said permanent fund for each of the purposes set forth in Finding 17.

## XII.

In holding that the disbursement from said permanent fund of the sum of \$547,421.25 referred to in Finding 16 constituted a lawful disposition of said fund in accordance with said Act of January 14, 1889.

## XIII.

In holding as a conclusion of law that plaintiffs are entitled to no recovery, and in directing that the petition be dismissed.

## XIV.

In entering judgment dismissing plaintiffs' petition.

## SUMMARY OF ARGUMENT

The points made in the following argument may be briefly summarized as follows:

### I.

Appellants are authorized to maintain this suit, against the United States as trustee, to redress wrongs suffered by the ultimate distributees of the trust,

(a) under the plain language of the Jurisdictional Act providing that equitable as well as legal claims shall be adjudicated, and that appellants in this litigation shall be considered as representing those entitled to share in the final distribution, and

(b) under the ordinary rules governing litigation in equity to charge a trustee for breaches of trust, such rules permitting representative suits to redress wrongful diversions of corpus to the damage of undetermined remaindermen, and even of remaindermen not yet in being.

### II.

The agreements of cession under the Act of 1889 constituted valid contracts "binding upon the Indians no less than the United States," and the trust fund and the rights of the remaindermen therein were not tribal, nor subject to be depleted in the exercise of the plenary control of Congress over tribal property, because

(a) The cession by the separate bands of their separate reservations and the creation, out of the proceeds of all the reservations, of a common trust fund in which all share equally per capita, was not a result which was, or could have been, effected through the exercise

of the plenary power of Congress, but depended for its validity upon the agreements which were valid contracts "binding upon the Indians no less than the United States," and which define and limit the arrangement to which the Indians assented.

(b) The class of persons designated by the Act of 1889 and the agreements of cession as the ultimate beneficiaries of this trust was not coincident with any existing or former tribe or band or tribal organization.

(c) The class of persons so designated as the beneficiaries of the trust has none of the characteristics of a tribal organization, neither common leadership, concert of action, nor lands or territory inhabited in common, nor any property subject to common control. No beneficiary or group or band of beneficiaries has any voice in the handling of the trust property, and there is no other common property whatever.

(d) The purposes of the Act of 1889 as shown by its plain language, and also by the report of the committee which drafted it and reported it for passage—"to break up their tribal relationships and ownership in common"—are consistent only with an intent that, at the end of the fifty-year trust period, the distribution of the corpus per capita was to be made to individuals of the class described, wholly without regard to their membership in, or even the existence of, any tribe, band or tribal organization.

(e) The express provision of the Act of 1889, for what this court termed "a reserved power in Congress to make limited appropriations" from the trust corpus (the provision for Congressional appropriation of not



over 5% of the fund for "promoting self-support and civilization") discloses a clear realization and intent on the part of Congress that its ordinary plenary power to make any disposition of tribal property which it deems beneficial to the Indians did not extend to the trust funds arising under these agreements of cession.

(f) Cases such as *Lone Wolf vs. Hitchcock*, 187 U. S. 553; *Gritts vs. Fisher*, 224 U. S. 640; and *Sizemore vs. Brady*, 235 U. S. 441, sustaining the plenary power of Congress over admittedly tribal lands and property held in common, and in the course of distribution solely to the members as such of an existing and continuing tribe, have no application to the clearly defined rights of the ultimate beneficiaries of the trust created by the agreements of cession here involved.

### III.

The withdrawals and disbursements from the permanent fund of which appellants complain were not authorized or contemplated by the agreements of cession creating the trust and violated the terms of the trust as defined in Section 7 of the Act of January 14, 1889. Certain of the withdrawals complained of were not authorized or attempted to be authorized by the terms of any subsequent Act of Congress and represent unlawful diversions of trust funds due to mere administrative errors without claim or color of justification under the plenary power of Congress.

### IV.

A judgment for the amount of the unlawful diversions, which under the express terms of the Jurisdictional Act is to be credited to the trust funds here involved, will be in

accord with the ordinary duty of a trustee to restore to the trust portions of corpus unlawfully diverted, will result in substantial justice, and is the remedy expressly provided by the Special Jurisdictional Act.

## ARGUMENT

### I.

#### The Authority of Appellants to Maintain This Suit for Diversions of Principal.

In *Minnesota vs. Hitchcock*, 185 U. S. 373, after a review of the Act of January 14, 1889, this court said:

"The cession was not to the United States absolutely, but in trust. \* \* \* The trust was to be executed by the sale of the ceded lands, and a deposit of the proceeds in the Treasury of the United States to the credit of said Indians. \* \* \* (etc., summarizing the provisions of the Act)."

The court further said in *United States vs. Mille Lac Chippewas*, 229 U. S. 498, that under the Act of 1889 the proceeds of the ceded lands were to be "placed in the treasury of the United States as a trust fund"; and that "the Indians, no less than the United States, were bound by the plain import of the language of the Act and the agreements."

Of the trust so created there were, under the plain provisions of Section 7 of the Act, two separate and distinct classes of beneficiaries, i. e.:

(1) A fluctuating class, embracing those from time to time entitled to share in annual distributions of interest during the fifty-year trust period, designated in Section 7 of the Act as "said Indians," and

(2) The ultimate "remaindermen" entitled to equal per capita distribution of the corpus of the trust—the "permanent fund"—at the end of the trust period, this class being described in Section 7 as "*all of said Chippewa Indians and their issue then living.*"

The qualifications of the income beneficiaries are of minor importance in this suit, where the claims relate to wrongful diversions of the principal, to the consequent damage of the second class of beneficiaries, *the remaindermen*.

As pointed out in the next subdivision of this brief it is the contention of appellants that whatever may be the answer to the mooted question of whether the interest beneficiaries are limited to persons who have maintained tribal affiliations, certainly eligibility to share in the ultimate distribution of principal is not dependent upon tribal or band membership or affiliation. However, in so far as the point now under consideration is concerned, all that is important is that there are two distinct classes of beneficiaries with different qualifications. Of those of "said Indians" included in the class of interest beneficiaries only those who survive to the termination of the trust will share in the principal distribution. Issue of members of the Chippewa bands in 1889 yet unborn and others who have never sustained or have abandoned all tribal affiliations will qualify to share in the final distribution, under the express definition of that class above quoted.

This was the situation with which Congress had to deal when it passed the Jurisdictional Act authorizing the litigation of rights and claims arising under the Act of 1889, and the subsequent amendments.

The original Jurisdictional Act of May 14, 1926 (44 Stat. 555) (R. 2), authorized the adjudication of all legal and equitable claims of "the Chippewa Indians of Minnesota."

without attempting to further define the class. In other words, the class authorized to sue was perhaps no broader than the class entitled to interest payments under the designation "said Indians."

By Act of June 18, 1934 (48 Stat. 979), Congress amended the Act expressly to include the remaindermen by providing:

"In any such suit or suits the plaintiffs, the Chippewa Indians of Minnesota, shall be considered as including and representing all those entitled to share in either the interest or in the final distribution of the permanent fund provided for by section 7 of the act of January 14, 1889 (25 Stat. 642), and the agreements entered into thereunder."

The motives of Congress in adopting this amendment are perhaps clear enough from the language used, but are rendered clearer by the reports of the house and senate committees recommending its adoption. The committee on Indian affairs of the house of representatives (H. R. Rep. No. 1325, 72nd Congress, 1st Session) in reporting on the bill H. R. 127, which became the Act of June 18, 1924 (*supra*), adopted as its report the report of the senate committee recommending an identical bill (S. 3879), reading, in part, as follows (italics ours):

"When the act of May 14, 1926 (41 Stat. 555), authorizing 'the Chippewa Indians of Minnesota' to sue in the Court of Claims became a law, the Interior Department then, and for many years theretofore, had construed the term 'the Chippewa Indians of Minnesota' as including all persons who were members of the different bands or tribes, at the time said agreements were entered into and their issue thereafter born, irrespective

of where born' (Op. Solicitor Mahaffie, dated February 17, 1919). Subsequent to the enactment of said act of May 14, 1926, the department changed its construction of the term 'the Chippewa Indians of Minnesota' so as to include *only those Indians, who, by living on or about the former reservations, have maintained tribal membership* (Op. Solicitor Patterson, dated January 8, 1927).

"If the term 'the Chippewa Indians of Minnesota' is confined to the Chippewa Tribe or to tribal members, as the Interior Department now insists, then it may well be said that this term, as used in the jurisdictional act of May 14, 1926, does not include all, or possibly any, of the class described in the agreements as 'said Chippewa Indians and their issue' who will be entitled, as remaindermen, to the principal of the fund at the expiration of the 50-year trust period. At the expiration of the 50-year trust period, the trust will come to an end and it is a serious question whether those then entitled to share in the final distribution will or could have any tribal status.

"The sole object of the bill is to make certain that the claims of the remaindermen, that is that class described in the agreements as 'said Chippewa Indians and their issue,' are before the court for determination, to the end that all claims which said Indians may have arising under or growing out of said act of January 14, 1889, and the agreements entered into thereunder, may be definitely and finally settled in the pending suits.

\* \* \*

"Your committee is of the opinion that the bill should be adopted, so that there may be no doubt that all claims arising under or growing out of the act of



January 14, 1889 (25 Stat. L. 642), which the Chippewa Indians, or *any class thereof*, have, may, in the pending suits, be finally adjudicated and closed as intended by the original act."

We have, then, a complete trust, established by trust instruments (the Act and agreements) which completely define the duties of the trustee, and the rights of the beneficiaries. We also have the trustee, by the Jurisdictional Act, not only waiving its sovereign immunity, but expressly providing that, although the trust has not yet terminated, the ultimate distributees of the corpus of the trust shall be deemed in court at this time, "to make certain that the claims of the remaindermen, that is that class described in the agreements as 'said Chippewa Indians and their issue,' are before the court for determination" (Committee Report *supra*).

In thus authorizing a representative suit by appellants to redress the wrongs of a class of ultimate distributees of a trust whose exact personnel is as yet undetermined, and in part unborn, Congress did not exceed what is ordinarily permitted in equity.

Thus Section 214, Comment (a), of Restatement of the Law of Trusts by the American Law Institute, after first stating the general rule that "if there are several beneficiaries of a trust, any beneficiary can maintain a suit against the trustee to enforce the duties of the trustee to him," contains the following comment:

"If a beneficiary of a trust has not been born or conceived (see Sec. 112, Comment d), a suit can be maintained on his behalf by a next friend or guardian to enforce the duties of the trustee. Thus, if the trustee is threatening to destroy or dissipate the trust prop-

erty, a suit can be maintained on behalf of an unborn person designated as beneficiary to enjoin him from so doing.

"If the trustee has discretion to select as beneficiary any one or more members of a definite class of persons (see Sec. 120), any member of the class can maintain a suit against the trustee prior to such selection. Thus, if a trust is created for a person for life and on his death the trustee is directed to convey the property to such one or more of the children of the life beneficiary as the trustee may select and the trustee prior to the death of the life beneficiary threatens to dissipate the trust property, any one or more of the children can maintain a suit against the trustee to enjoin him from so doing."

The character of this suit as one to enforce the liabilities of a trustee of a still existing trust for diversions of corpus is further indicated by the provision of Section 10 (R. 5) of the Special Jurisdictional Act (44 Stat. 555), directing that any amount recovered be deposited in the Treasury of the United States, as funds standing to the credit of the Chippewa Indians of Minnesota, and bear interest, like the balance of the trust fund, at 5 per cent per annum. This is in substance a provision for the restoration to corpus of amounts wrongfully disbursed therefrom, and is further clear evidence of the nature of the issues Congress intended to be adjudicated herein.

It is submitted, therefore, that both the trustee and the beneficiaries entitled to share in final distribution are before the court for the enforcement of the equitable remedies available to such *cestui qui trustent* for unlawful diversions of trust property; that any losses suffered as a result of such

diversions by the ultimate distributees as a class are to be redressed in this action, and that for any such legal or equitable claim "arising or growing out of the Act of January 14, 1889, or any subsequent Act of Congress," plaintiffs are entitled to judgment; the proceeds of which will, under Section 10 of the Jurisdictional Act (44 Stat. 555), be credited to the principal fund above referred to.

## II.

### The "Permanent Fund" Was Not Subject to the Plenary Control of Congress.

The Court of Claims held that the agreements entered into between the United States and the twelve bands of Chippewa Indians located in Minnesota "did not create a contract" (R. 61), and held (R. 60):

"The lands and funds of the various bands of Indians were tribal and subject to the plenary power and authority of Congress. This fact is indisputable."

Since, as pointed out above, the major portion of the diversions of the fund here complained of were effected in accordance with Acts of Congress authorizing or directing the diversions, this holding presents a major issue in the case.

The Court of Claims at several points in its opinion stresses its conclusions that in the enactment of what it terms "statutes similar to the Act of 1889," Congress did not surrender its plenary power over tribal lands and property, and that if it be held that this was done by the agreements entered into under the Act of 1889 "it is the first time in the history of Indian legislation that this has been done" (R. 64).

The Act of 1889 *was* radically different from the ordinary Indian legislation. As we will endeavor to point out in this section of the brief, the plan proposed for acceptance by the Indians under the Act of 1889 *dealt with an unusual situation in an unusual way*. For this reason the Act and the agreements entered into under its authority, assenting to the plan proposed by the Act, and ceding the lands involved pursuant thereto, find no precedent in other Indian legislation, and were designed to, and did, create duties, rights and relationships entirely different from those contemplated or created by any other legislation relating to the disposition of Indian property or its proceeds.

The peculiar situation with which the Act of 1889 proposed to deal becomes apparent when we consider the state of the Indian titles upon which the Act proposed to operate.

As pointed out above, these Chippewa bands who had settled in Minnesota were part of the great Chippewa nation, which, without regard to state boundaries, originally had occupied an area from Lake Huron on the east and into the Dakotas on the west. The nation as a whole was originally recognized and treated with as a single tribal entity, vested with the common Indian title in, and entitled as a tribe to cede, all or any part of the vast area so held. In later treaties this great tribe was dealt with as divided into distinct and separate bands, each occupying and holding the exclusive Indian title to a separate area, and each recognized as "*entitled to hold or cede the same independently of the other bands or of the Chippewas as a whole*" (Opinion below, R. 64; *Chippewa Indians of Minnesota vs. United States*, 301 U. S. 358, at 360-1).

As to the separate and exclusive nature of the title held by each band, this court said in the last cited case (301 U. S. 358, 373):

"The recognition of a Chippewa band as having title to a reservation occupied by it was not confined to the Red Lake bands or to the Red Lake Reservation. On the contrary, it had long been the settled rule in respect of the Chippewa Indians in Minnesota that a band or bands occupying a separate reservation should be regarded and dealt with as having the full Indian title to the lands therein. The Indians both recognized and gave effect to the rule. Many cessions were negotiated and carried out in conformity with it. The band or bands occupying a reservation ceded it in whole or in part without any participation by other bands and received and enjoyed the compensation without sharing it with others. Under the rule each of the bands existing in 1889 had theretofore made cessions and received pay therefor quite independently of the other bands."

The subject matter with which the Act of 1889 proposed to deal was therefore the "separate and exclusive titles in their respective reservations, held by each of the several bands *"independently of the other bands, and of the Chippewas as a whole."* No Indian except a member of the band occupying a particular reservation had any right in that reservation, or to cede the same, or, if ceded, to participate in the proceeds thereof.

The areas and values of the various reservations thus separately held by these bands, and the membership of the various bands, varied widely. Thus the Red Lake Reservation contained 3,200,000 acres and was held by bands having a population of only about 1,100, or in the ratio of nearly 3,000 acres for each Indian in the bands holding the exclusive Indian title. The Red Lake and White Earth Reservations included timber of great value. Some reservations



included little or no timber. On the Mille Lac Reservation a band of 942 Indians held the Indian title to only 61,000 acres, or only slightly in excess of 60 acres for each individual (H. R. Report No. 789, 50th Congress, First Session, p. 2). The lands of the latter band would not have been sufficient to have made 80 acre allotments to all the band members. The other bands held reservations of varying areas and values between the above extremes (*id*).

Under the rule established in *Lone Wolf vs. Hitchcock*, 187 U. S. 553, Congress, in exercise of its plenary power, and regardless of the assent of the Indians, might have provided that the members of each band should be allotted on their own reservation and that the balance, if any, of that reservation should be disposed of and the proceeds administered as a trust fund exclusively for members of that band. This would, however, have resulted in tremendous accumulations for the members of more fortunately situated bands, while those holding the smaller and poorer reservations would have been left wholly dependent on the bounty of the government for support.

Of this situation Congress was fully aware. The report of the Committee of the House of Representatives which reported for passage the bill which became the Act of 1889 (H. R. Report No. 789, 50th Congress, First Session) discloses an intimate acquaintance with the situation, and describes the membership in the various bands, the areas in the various reservations and the character of the lands and timber therein. It criticizes other proposed legislation which would have given to the more fortunately situated bands the entire proceeds of their reservations and left the remaining Indians in a state of comparative poverty, and recognizes that the lands in question, though now separately held by the various bands, had been, at one time, the common prop-

erty of the Chippewa nation. Reciting these material facts, the Committee report in question (page 6) concludes with the following language:

"To carry out these general views your committee have prepared and introduced the accompanying bill (H. R. 7935) entitled 'A bill for the relief and civilization of the Chippewa Indians in Minnesota,' and recommend the passage of the same.

*"The bill is in the nature of a proposal to the Indians, and if not accepted by them is inoperative and nugatory. If accepted and assented to by at least two-thirds of the male adults of each band, the bill, if passed, becomes effective. In brief, the bill, if accepted by the Indians, aims to break up their tribal relations and make them full citizens, to allot ample land to each of them in severalty, to dispose of the residue of the lands—the pine lands for the highest possible figure, the agricultural lands at \$1 per acre to actual settlers under the homestead laws—and to give all the Indians the entire benefit of the proceeds of the lands, less the necessary expenses, attending their survey, appraisal, and disposal. As to details the bill itself speaks for itself, and is believed by your committee, fully and fairly, in a just and practical measure, to carry out the design of the general plan outlined as hereinbefore described."*

It was pursuant to this report that the Act of 1889 was ultimately adopted, providing that all of the lands (save those required for allotments) on all of the reservations held by these bands, were to be ceded to the United States in trust for "all the Chippewa Indians in the state of Minnesota," under provisions whereby the interest of every Chippewa Indian in Minnesota in the commingled proceeds

of all the reservations was to be substantially equal to the interest of every other such Indian, without regard to the band to which he had belonged, or the area or the value of the reservation ceded by that band for the common benefit.

Thus the proposed arrangement disregarded entirely the former exclusive right and title of each of the separate bands in its own reservation; disregarded the fact that no band had any interest in any other reservation; and vested in the beneficiaries of the trust new interests entirely different and distinct from any pre-existing right held as members of any band or bands. For example, each of the 1,100 Indians who held the exclusive title to the Red Lake Reservation and ceded therefrom more than 3,200,000 acres was entitled to no greater per capita share in the common trust fund than each of the 1,100 members of the Leech Lake band who ceded to the trust a reservation embracing only 94,000 acres, or less than  $1/32$  as much (H. R. Report 789, 50th Congress, First Session, p. 2).

In still another respect, the Act of 1889 proposed to appropriate lands held by one band of Indians for the benefit of other bands who had no interest therein. The White Earth Reservation, in addition to large amounts of timber, embraced the best agricultural land held by any of the Chipewa bands—some of the best farming land in Minnesota. It had been reserved by treaty exclusively for, and was occupied and held solely by the White Earth bands. Yet the Act of 1889 gave to the members of all the other bands (except those at Red Lake, who were to be allotted on their own reservation) the right to be removed to White Earth, and to select individual allotments out of the White Earth Reservation (Act of January 14, 1889, 25 Stat. 642, Sec. 3, R. 37), the amount of any allotments previously made to White Earth Indians being deducted from the allotments

which such Indians were to receive under the new plan. Approximately 4,749 other Indians thus acquired the right to receive and hold, in individual allotments, lands previously held in common solely by the 1,169 members of the White Earth bands (H. R. Ex. Doc. 247, 51st Congress, 1st Session, summary of census, p. 9). By this provision, as well as by the provision for the pooling of the proceeds of all the ceded lands, the Act of 1889 proposed to "give the lands of one band \* \* \* to another," a transaction which this court has held to be beyond the plenary power of Congress (*Chippewa Indians vs. United States, infra*).

Congress did not assume to effect this radical change in existing rights merely through the exercise of its plenary power, but as its Committee said, submitted the plan "in the nature of a proposal to the Indians, which, if not accepted by them, is inoperative and nugatory." That the Act of 1889 does not represent an exercise of the plenary power was expressly held by this court in *U. S. vs. Mille Lac Chippewas*, 229 U. S. 498, at 506, where this court said:

"A manifest purpose of the Act (of Jan. 14, 1889) was to bring about the removal to the White Earth Reservation of the scattered bands \* \* \* and this was to be accomplished not through the exertion of the plenary power of Congress but through negotiations with and the assent of the Indians."

Not only did Congress elect not to use its plenary power to effect the results contemplated by the Act of 1889, but the result attained by the voluntary agreements of cession entered into between the United States and the separate bands could not have been attained by the exercise of such plenary power.

This conclusion we submit follows from a consideration

of the state of the Indian titles prior to the cessions under the Act of 1889, as above described, the result attained by those cessions and the decision of this court in *Chippewa Indians of Minnesota vs. United States* (Red Lake Band, intervenors), 301 U. S. 358.

If Congress had attempted, under its plenary power alone, to thus admit members of any of the bands to a share in the benefits of one of the reservations not occupied by them, without the separate consent of the separate band holding the Indian title to such reservation, such action would have been invalid. And this would have been true even if all the Indians except the band owning the reservation in question had unanimously approved and ratified the Act. Thus, in the case of *Chippewa Indians of Minnesota vs. United States* (*supra*), Justice Van Devanter said (301 U. S., at 375):

"Our decisions, while recognizing that the government has power to control and manage the property and affairs of its Indian wards in good faith for their welfare, show that this power is subject to constitutional limitations, and does not enable the government to give the lands of one tribe or band to another, or to deal with them as its own." Citing *Lane vs. Pueblo*, 249 U. S. 110; *U. S. vs. Creek Nation*, 295 U. S. 103, and *Shoshone Tribe vs. U. S.*, 297 U. S. 476.

Because of this rule, the court, in that case, held that the otherwise plain language of Section 1 of the Act of January 14, 1889, to the effect that "as to the Red Lake Reservation the cession and relinquishment shall be deemed sufficient if made and assented to in like manner by two-thirds of the male adults of all of the Chippewa Indians in Minnesota," did not eliminate the necessity of a *separate* cession of the



Red Lake Reservation by the Red Lake bands, and that, *to save the Act from probable invalidity*, this provision must be construed to imply that as to the Red Lake Reservation "the cession was to be not only by two-thirds of the male adults of the bands occupying that reservation, but also by two-thirds of the male adults of all the Chippewa Indians in Minnesota." (301 U. S., at 376.)

In other words, the court held that Congress could not have authorized the cession of the Red Lake Reservation for the benefit of "all the Chippewas in Minnesota" save with the separate consent of the Red Lake bands as its exclusive owners. And as a result it was held that the extent of the cession of the Red Lake Reservation actually effected under the Act of 1889 was strictly limited by the express exception from the cession set forth in the agreement with the Red Lake bands (301 U. S., at 378), notwithstanding the broader language of cession as to that reservation contained in the other agreements signed, in strict accordance with the above quoted provision of the Act, by more than the required two-thirds of all the male adult Chippewas in Minnesota.

The title of the Red Lake bands in the Red Lake Reservation was no more exclusive than the right of each of the other bands in the reservation held by it. We therefore confidently assert that none of the reservations could have been appropriated to the uses and purposes contemplated by the Act of 1889 under the plenary power, or *without the assent of the band holding the separate title thereto*.

It has seemed to us worth while to make clear that the Act of January 14, 1889, exceeded the plenary power of Congress, and depended for its validity upon the assent of the Indians, because of the light which this throws upon

the nature of the beneficiary class as distinct from the pre-existing bands.

To illustrate this point we layte comparison with the situation presented in *Lone Wolf vs. Hitchcock*, 187 U. S. 553. In that case, the plenary power of Congress was held to authorize the appropriation by the United States of title to an Indian reservation upon the payment or setting apart *for the benefit of the tribe holding the communal Indian title*, of the sum of \$2,000,000, and the making of individual allotments *to tribal members*. Before the legislation complained of, the tribe, as such, held tribal title to the reservation. After the legislation, the individual members of the tribe, as such members, had, or were entitled to, separate allotments, and there was set aside in the Treasury of the United States the sum of \$2,000,000 "*for the benefit of the tribe*," this amount having been set apart as "the consideration for the surplus of the land over and above the allotments." This transaction the court characterized as follows:

"In effect the action of Congress now complained of was but an exercise of such (plenary) power, a mere change in the form of investment of Indian tribal property."

Under the agreements of cession made pursuant to authority contained in the Act of January 14, 1889, the United States similarly acquired title to lands which were formerly the communal property of the separate bands of Indians. Allotments were to be made from these lands to individuals, and a trust fund was to be set up, including all the net proceeds received from the disposal of the lands. Thus far the transaction was substantially identical with that involved in the *Lone Wolf* case.

The distinction is found when we compare the beneficial provisions of the respective trusts. In the *Lone Wolf* case the beneficiary was the identical tribe which held the Indian title to the ceded reservation, and the trust fund was the consideration paid for the cession. The beneficiary of the trust and the owner of the land were identical, *i. e.*, the tribe and its members as such. In the *Chippewa* case the beneficiaries of the proceeds of each of the separately owned reservations were not limited to the band of Indians which formerly exclusively owned that reservation, nor to the members of that band, nor were they any known tribal entity, but "all the Chippewa Indians in the State of Minnesota," and (at the time of final distribution), "*their issue then living in equal shares.*"

If this class had been an Indian tribe holding a common tribal title to the several ceded reservations, the conditions of the *Lone Wolf* case would have been approximated. Here, in fact, each reservation was separately held by a separate band, and there was no tribe or tribal organization whose members had a common interest in all the ceded reservations. It is because the Act of 1889, in consequence, involved in substantial measure the taking of the lands of each of the bands and permitting persons not members of such band to share in the proceeds thereof, that, in *Chippewa Indians vs. Minnesota, supra*, the transaction was held to be beyond the plenary power of Congress.

We submit that the state of the Indian titles with which Congress proposed to deal, and the radical result which Congress sought to obtain, explain fully why Congress elected, in enacting the Act of 1889, to adopt a distinct departure from other Indian legislation. Here, to protect the poorer bands, Congress sought to have the proceeds of each reservation applied, not for the exclusive benefit of members of the

band which held the exclusive tribal title, but for a new, larger and different class including members of other bands who had no prior interest therein, and, ultimately, "all the Chippewa Indians in Minnesota and their issue."

We have seen that any such disposition of tribal property is beyond the plenary power, and must *depend for its validity upon the assent of each band to the proposed disposition*. This being true, *the only authorized disposition of such property, or its proceeds, is that so assented to, and the powers, rights and duties of the parties involved are necessarily definitely and permanently fixed and limited by the terms of that assent*. Unless a particular use or disposition of the ceded lands or their proceeds is in accordance with that assent, as expressed in the agreements it is, of necessity, unauthorized and unlawful.

It was as a result of this situation that this court, in *United States vs. Mille Lac Chippewas* (229 U. S., at 507), held that as to this transaction, "*the Indians, no less than the United States, were bound by the plain terms of the Act and the agreements.*"

No other Act of Congress in connection with Indian affairs ever involved a situation comparable to this, or attempted to deal with it in this manner. The Act of 1889, in this regard, is unique and *sui generis*.

Since the assent of each of the separate bands was necessary, and the authorized dispositions of the Chippewa lands and proceeds are limited to what was thus assented to, we now invite consideration of the question, "What did they assent to?" Did they, as the lower court held (R. 59), consent and agree to "a resumption of a tribal unit, always known as the Chippewa Indians of Minnesota—an abandonment of band organization and return to a tribal one"? Was it intended or contemplated by either party

that the "permanent fund" made up of the proceeds of the ceded lands should be subject to the unlimited plenary control of Congress?

Since each agreement with the several bands recited the reading, translation and explanation of the Act of 1889 to the Indians, and their acceptance and ratification thereof, and since each agreement ceded the particular reservation involved "for the purposes and upon the terms stated in the Act," we may properly look to the Act for an answer to this inquiry.

At the outset, the Act itself (Section 1, R. 36) necessarily directs negotiations with "all the *different bands and tribes* of Chippewa Indians in the State of Minnesota," and the cession, as to each reservation, is to be by the male adults of the band occupying the reservation. This, as we have seen, was exactly in accord with the true state of the Indian title, each band owning exclusively its separate lands, and no common tribe or unit having jurisdiction over the reservations as a whole.

It is important to note that after this meticulously correct provision for "the complete extinguishment of the Indian title" by separate cessions by the several bands of the Indian titles to their respective reservations, *the Act contains no further reference to any band or tribe.*

The money accruing from the disposal of the lands accrues, *not* to "all the *bands or tribes* of Chippewa Indians in Minnesota," from whom the cessions were to be taken, nor to the members of said bands as such, but (Section 7) is to be placed in the treasury to the credit of a class of persons described as "all the Chippewa Indians in the State of Minnesota."

The annuities out of the interest fund are payable "in equal shares per capita" to individuals described as "said



Indians"—not to any band or tribe, nor to members of any band or tribe as such.

*As to the final distribution of the fund* at the end of the fifty-year trust period, the class is expressly broadened by the provision for distribution, not to the then members of the ceding bands, nor even merely to "said Indians," but "to all of said Chippewa Indians and their issue then living, in cash, in equal shares."

Neither the class to whose credit the fund is to be placed ("all the Chippewa Indians in the State of Minnesota"), the class to whom interest payments are to be made ("said Indians") or the class of ultimate distributees or remaindermen who were to receive the corpus in equal shares at the end of the fifty-year trust period ("said Chippewa Indians and their issue then living") corresponds in any way to any Indian band, tribe or tribal entity previously recognized or known.

The Chippewa Indians "in Minnesota" formed only part of the Chippewa Nation, which knew no state boundaries and held sway from Lake Huron into the Dakotas. That portion of the nation happening to dwell in Minnesota had no separate tribal or other organization, and no right to speak for the nation as a whole.

The bands located in Minnesota were, as we have seen, separate entities, each with separate lands and a separate tribal organization, but with *no common tribal or other organization* of, or representing, the Chippewas in Minnesota as a whole, or entitled to cede any Indian lands in that state.

*No law, treaty, agreement or executive order had ever recognized or purported to deal with these bands as a unit, or with any tribal organization equivalent to or approximating the classes of persons described in Section 7 of the Act*

*of 1889 as the persons entitled to share in distributions from the trust.*

In this connection the Court of Claims in the original opinion below (R. 71) quotes the language of this court in the *Kadrie* case (281 U. S. 206, 208, discussed *infra*), as follows:

"When the act of 1889 was passed, the Chippewa Indians in Minnesota comprised eleven bands or tribes occupying ten distinct reservations in that state in virtue of treaties or executive orders. Collectively they were regarded as a single tribe, and commonly called Chippewas of Minnesota."

The statement that "collectively they were regarded as a single tribe" does not indicate that they had ever been recognized as such, or that any such tribal organization existed. This is shown by the note appended to this statement by the court (281 U. S. 208), reading as follows:

"These Indians formerly were part of the Chippewa or Ojibway Nation of the Great Lakes region. The Nation comprised many subordinate bands or tribes, some of which came to be permanently located in Canada and others in Michigan, Wisconsin, Minnesota, and perhaps other states. The bands or tribes which came to be seated in Minnesota have latterly been designated as the *Chippewas of Minnesota* by way of distinguishing them from those seated elsewhere. Treaties, September 24, 1819, 7 Stat. 203; June 16, 1820, 7 Stat. 206; August 5, 1926, 7 Stat. 290; July 29, 1837, 7 Stat. 536; October 4, 1842, 7 Stat. 591; February 22, 1855, 10 Stat. 1165; March 11, 1863, 12 Stat. 1249; October 2, 1863, 13 Stat. 667; May 7, 1864, 13 Stat. 693; March 19, 1867, 16 Stat. 719; House Doc., vol. 61, 59th Cong. 1st Sess., pp. 277-

280; History of Ojibway Nation, Copway, pp. 170-171; Minn. His. Soc. Cols., vol. 5, pp. 37-4, 507-509; also vol. IX, pp. 55-56."

The treaties cited in this note were made, in each instance, either with the great Chippewa Nation as a whole, or with a separate band or bands "seated in Minnesota." This is shown by the following list of the treaties cited by the court:

Treaty of September 24, 1819 (7 Stat. 203), made at Saginaw, Michigan, with "*the Chippewa Nation of Indians.*"

Treaty of June 16, 1820 (7 Stat. 206), made at Sault Ste. Marie, Michigan, with "*the Chippewa tribe.*"

Treaty of August 5, 1826 (7 Stat. 290), made at Fond du Lac, Minnesota, with "*the Chippewa tribe.*"

Treaty of July 29, 1837 (7 Stat. 536), made at St. Peters, Wisconsin, with "*the Chippewa Nation.*"

Treaty of October 4, 1842 (7 Stat. 591), made at La Point, Wisconsin, with "*the Chippewa Indians of Mississippi and Lake Superior*" (ceding an area of lands in both Minnesota and Wisconsin).

Treaty of February 22, 1855 (10 Stat. 1165), made at Washington, D. C., with "chiefs and delegates representing the *Mississippi, Pillager and Lake Winnibigoshish bands of Chippewa Indians*" (ceding areas in Minnesota occupied by said separate bands).

Treaty of March 11, 1863 (12 Stat. 1249), made at Washington, with the parties to above 1855 treaty and amending same.

Treaty of October 2, 1863 (13 Stat. 667), made at Red Lake, Minnesota, with the *Red Lake and Pembina (Minnesota) bands*, ceding part of their separate reservation.

Treaty of May 7, 1864 (13 Stat. 693), made at Washing-

ton, with the *Red Lake and Pembina bands*, consenting to an amendment of above (1863) treaty.

Treaty of March 19, 1867 (16 Stat. 719), made at Washington, with chiefs of the *Mississippi bands*, ceding portions of lands reserved to those bands in prior treaties.

An examination of the record of the government's dealings with these Indians prior to 1889 discloses no treaty, agreement, law or executive order which treated or dealt with the Chippewa bands in Minnesota as a tribe or unit. The most that can be said of the situation is the statement in the note above quoted that the bands seated in Minnesota were sometimes designated as the Chippewas of Minnesota "by way of distinguishing them from those seated elsewhere." *No common tribal organization of the Minnesota Chippewas had been recognized or existed.*

In the court below, defendant frankly conceded that if the trust beneficiaries were a tribal entity, they were a *new* tribal entity. Thus in defendant's brief (R. 151 in Court of Claims), the government's position is stated:

"The defendant contends that the Chippewa Indians of Minnesota were tribal Indians at the time of the passage of the act of ~~January~~ January 14, 1889, that since the passage of that act they, *as a new entity*, have remained tribal Indians, and that their property is tribal property, and, therefore, is and at all times has been subject to the plenary control of Congress."

Again counsel for defendant said, in their brief below (R. 166, Court of Claims):

"Under the act of 1889 the various bands and tribes were united and became a new tribal entity."

As we have seen, the beneficiaries of the trust were sq

different from the tribal units effecting the cession that the proposed arrangement was not one which could have been effected under the plenary power. Does any provision of the Act or agreements warrant a conclusion that the beneficiaries were to form or constitute a *new tribal entity*?

No better definition of the traditional Indian tribe or band has been found than that embraced in *Montoya vs. United States*, 180 U. S. 261, where the court said:

"By a 'tribe' we understand a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory; by a 'band,' a company of Indians not necessarily, though often, of the same race or tribe, but ~~united under~~ the same leadership in a common design. While a 'band' does not imply the separate racial origin characteristic of a tribe, of which it is usually an offshoot, it does imply a leadership and a concert of action. How large the company must be to constitute a 'band' within the meaning of the act it is unnecessary to decide. It may be doubtful whether it requires more than independence of action, continuity of existence, a common leadership, and concert of action."

Tested by this definition, the non-tribal character of the class designated as beneficiaries of the trust arising under the Act of January 14, 1889, becomes apparent. No common government or leadership existed as to "all the Chippewa Indians in Minnesota," nor was any provided for. Except for portions reserved for individual separate allotments, the "particular territory inhabited" by these Indians was ceded to the United States under cessions expressly providing that upon their approval by the President, the Indian title



should be deemed "completely extinguished." The several organizations of the separate Minnesota bands, although not immediately dissolved, retained no jurisdiction or control over any part of the permanent fund of "all the Chippewa Indians in Minnesota." No provision was made by the Act of 1889 for any government, leadership, unity of action, or control by any Indian organization over these funds. No portion of these funds is ever payable to any Indian organization but solely to persons of the class described. Tribal property "belongs to the tribe as a community, not to the members severally or as tenants in common." (*Gritts vs. Fisher*, 224 U. S. 640.) Here no group or class has any right as such to control or receive any part of the fund. The only beneficial rights are those of individual members of the designated classes to receive equal per capita payments.

In addition, *it was the avowed intent of the Act of 1889 to end the tribal status of these Indians.*

Thus the committee on Indian affairs of the house of representatives, reporting for passage the bill which became the Act of January 14, 1889, said (H. R. Rep. No. 789, 50th Congress, 1st Session, p. 5) (*italics ours*):

"It is now conceded on all hands that the only safe and practical way to civilize the Indians is by allotting lands in severalty to them—*breaking up their tribal relationships* and ownership in common, and putting them to work *as individuals* on their several allotments.

\* \* \* To carry out these general views your committee have prepared and introduced the accompanying bill (H. R. 7935), entitled: 'A bill for the relief and civilization of the Chippewa Indians in Minnesota.' \* \* \*

In brief, the bill, if accepted by the Indians, aims *to break up their tribal relationships and make them full citizens.* \* \* \*

The Court of Claims in its opinion herein said (R. 56) :

"It is sufficient for the purposes of this case to state that Congress in enacting the act clearly intended to put in effect the Government's prevailing Indian policy, *i. e., secure the dissolution of the various Indian Bands and Tribes involved*, allot them lands in severalty, dispose of surplus lands for their benefit, and otherwise seek to civilize the Indians themselves."

The same legislative intent was found by this court, the court saying in *Wilbur vs. United States ex rel. Kadrie*, 281 U. S. 206, 208-9:

"The Act of 1889 was directed to accomplishing their transition from existing tribal relation, and dependent wardship to full individual emancipation and its incident rights and responsibilities and *to that end* the Act made provision for obtaining a cession of all their tribal lands \* \* \* and for selling the ceded lands, and creating with the net proceeds an interest bearing fund.  
\* \* \*

While the court correctly remarks later in that opinion that the contemplated transition from a tribal to an emancipated status was to be "gradual rather than immediate," it is certainly to be assumed that Congress having stripped the bands of all their common title to the reservations where they existed, and of all control over the proceeds of this property, contemplated that in the half century provided to intervene before distribution was made, a large part, if not all, of the individual beneficiaries would be persons who had attained "full individual emancipation and its incident rights and responsibilities," and were no longer affiliated with any tribe or band. Surely Congress did not intend that the ultimate distribution to individuals, in cash, of the pro-

ceeds of their entire Indian heritage, was to be limited to beneficiaries who had retained membership in one of the tribal organizations whose termination was one of the objects of the Act. A provision limiting the distributees of the principal to tribal members would, of course, have forced the Indians to maintain tribal organizations and tribal membership to avoid the loss to themselves and their children of their respective shares in the property to which they were entitled, and the avowed intent would have been frustrated. Certainly no such intention is to be implied.

*The Act studiously avoids any mention of any requirement of past or present tribal membership as a condition to membership in the class of persons entitled to share in the final distribution, and defines the class so broadly as to clearly exclude any such requirement. The class so entitled to equal per capita shares is made up of those "then living" of (1) "said Chippewa Indians," i. e., those persons who made up the original bands, and (2) "their issue," an all-inclusive term having nothing to do with tribal membership or band affiliation.*

Finally, it is submitted that Congress evidenced its complete realization that the Act contemplated the creation of rights in the corpus of the fund not subject to its plenary administrative control over tribal property, by its provision for what Justice Van Devanter accurately describes (*supra*) as "a reserved power in Congress to make limited appropriations from the fund during the fifty-year period for the purpose of promoting civilization and self-support among the Indians."

Under this provision, the power is reserved in Congress, "in its discretion, from time to time \* \* \* to appropriate, for the purpose of promoting civilization and self-support among said Indians, a portion of said principal sum not ex-

ceeding five per centum thereof."

If this fund was tribal in character, subject to "the full administrative power possessed by Congress over Indian tribal property" (*Lone Wolf vs. Hitchcock, supra*), and if Congress was, in consequence, free to "pursue any course with regard thereto which, to it, seemed better for the Indians" (*Sizemore vs. Brady*, 235 U. S. 441), then, of course, no such "reserved power" was necessary. If this fund is tribal, Congress had unlimited power. It could have appropriated the entire fund for their civilization, support, education, or any other Indian purpose, without restraint or limitation. If this be so, this "reserved power to make limited appropriations" was a superfluous and inoperative provision, calculated only to deceive the Indians into a false belief that they and the government had agreed to a valid restriction on this power.

No such intent is to be assumed. The Act must be construed so as to render this limitation purposeful and effective. The fact that Congress believed it necessary to reserve, and the Indians to grant, this limited power is consistent only with a deliberate intent to create non-tribal rights, free from the general unlimited plenary power over tribal assets, and a realization that without this provision Congress could not lawfully divert any part of the principal.

It is submitted that the Act is replete with evidence that Congress accurately knew and appreciated the state of the prior Indian title, and, *desiring and intending to terminate all tribal relations*, made the provisions above discussed for distribution of the proceeds to a new class or entity having no tribal characteristics, and embodied these provisions in binding agreements, upon which the entire validity of the transaction depends.

There remain for consideration the cases principally relied on by the court below in arriving at its conclusion as to the tribal nature of the trust funds here involved. These cases include *Wilbur vs. United States ex rel. Kadrie*, 281 U. S. 206; *Gritts vs. Fisher*, 224 U. S. 640, and *Sizemore vs. Brady*, 235 U. S. 441.

The first of these involved an application by Sarah Kadrie, a duly enrolled member of the White Earth band of Chippewa Indians of Minnesota, for the enrollment of certain of her children *as members of the class entitled to share in the annual distribution of interest from the trust funds*.

As appears from the opinion (281 U. S. 212-213) Sarah Kadrie had married, a naturalized citizen of the United States in 1909. Of her nine children, the first four were born in Canada and others at International Falls and St. Paul, Minnesota, so that as the court says (281 U. S. 213): "While all of the relators have a minor fraction of Chippewa blood, they were born of parents having no tribal relations then or since, and have lived only in white communities."

The first three of the children were nevertheless placed on the interest rolls when born, as "issue" of an enrolled Chippewa Indian. In 1916, however, the Indian Bureau refused to enroll the fourth child, and cancelled the prior enrollment of the first three, on the theory that, under the general rule applicable to tribal property, the offspring of a marriage between an Indian woman and a white man are not entitled to share in annuities or other benefits as Indians.

In 1919, the then Secretary of the Interior, following an opinion given by the solicitor for that Department, reversed the 1916 ruling and directed that all the children then born be enrolled as entitled to annuities.

In 1927, a succeeding Secretary of the Interior, adopting



and applying an opinion given by a succeeding solicitor, held that none of these children were entitled to share in the interest annuities.

It will be noted that from 1890, when the agreements entered into under the Act of 1889 became effective, to 1916, when the enrollment of the Kadrie children was cancelled, and again from 1919 to 1927, the Indian Bureau apparently ruled that all "issue" of members of the Chippewa bands, as they existed prior to 1889, were entitled to share in the interest benefits of the trust without regard to tribal membership or affiliation. It was only from 1916 to 1919, and again after 1927, that the Secretary regarded tribal membership as important, *even as to the interest annuitants*. The final ruling (1927) as to effect that the interest annuitants were limited to tribal members came only after this suit was commenced.

To review the action of the Department taken in 1927 in striking the Kadrie children from the rolls, an action in mandamus was instituted against the Secretary of the Interior to compel their restoration.

In that proceeding the Court of Appeals of the District of Columbia directed the issuance of a writ requiring the Secretary to restore the names of the Kadrie children to the interest payment rolls. The Court of Appeals said (30 Fed. (2d) 989):

"Referring again to the provisions of Section 7 relative to the disposition of the funds 'placed in the treasury of the United States to the credit of all the Chippewa Indians, in the State of Minnesota, as a permanent fund' it is apparent that when the fund was so deposited this limitation was not carried into the division of the permanent fund, since it is provided that it shall be

divided and paid to all said Chippewa Indians and their issue then living.' This comprehends all the issue, direct and lineal, of the Chippewa Indians living in Minnesota in 1889, wherever living or wherever located. The inducement to sever the tribal relation and establish the habits of civilization as afforded by the statutes, was accorded by Congress without requiring that residence should be confined to the State of Minnesota. Consequently, no limitation in that respect appears in the act. It, therefore, becomes immaterial whether the children of Sarah Kadrie were born in Canada or in Syria; so long as she retained her citizenship in the United States.

"We think a reasonable interpretation of the intent of Congress justifies the extension of the privilege of this act to the lineal descendants of the Chippewa Indians, recognized as such at the time of the passage of the act of 1889, \* \* \*. We think the expression 'and their issue then living' includes all of the issue, and, therefore, should be extended to the relators."

It will be noted that the Court of Appeals made no distinction whatever between the interest beneficiaries and the ultimate distributees of the fund and held that in neither instance was tribal membership or affiliation essential to participation.

From this decision the Secretary petitioned this court for review by certiorari. In his petition for certiorari the Attorney General, appearing for the Secretary of the Interior, *did not question the correctness of the conclusion of the Court of Appeals that the ultimate distributees of the corpus of the fund at the end of the trust period were not limited to tribal members*, but did contend that the interest

beneficiaries, described in the Act of 1889 only as "said Indians," were limited to persons who had maintained tribal relations. Thus, in the petition for certiorari in that case, the Attorney General says:

"Section 7 of the Act of January 14, 1889, contains *two distinct provisions* relative to the proceeds of the sale of the tribal lands of the Chippewa Indians in the State of Minnesota, now held *as a trust fund* in the Treasury of the United States. One of those provisions relates to the disposition of the income derived from the fund while it is held in trust. The other provision relates to the disposition of the fund itself at the expiration of the fifty-year period fixed by the statute.

"With respect to the income of the fund, it is provided that during the fifty-year trust period one-half of the interest derived from the fund shall be paid annually to the heads of families and the guardians of orphan minors for their use; that one-fourth of the interest shall be paid in equal shares per capita to all other classes of the said Indians; while the balance of the annual interest is to be used for the purposes of Indian schools.

"It is plain, therefore, that in order to entitle any person to share in the income derived from the trust fund, a satisfactory showing must be made that he or she belongs to some of the above groups or classes of Chippewa Indians in the State of Minnesota, as contemplated by the Act.

"With respect to the *final disposition* of the fund at the expiration of the fifty-year trust period, *the provisions of the Act are much broader*. It is provided that at the expiration of the said fifty years the permanent

fund shall be divided and paid to all of said Chippewa Indians and *their issue* then living, in cash, in equal shares. The distinction is obvious. \* \* \*

"When the fund finally is released from the trust at the expiration of the fifty-year period, a different situation arises, and a different provision for its disposition is made by the statute. *It is then, at the end of said fifty-year trust period, and not until then, that the 'issue' then living of the tribal Chippewa Indians contemplated by the statute become entitled to participate in the distribution of the fund.*

"It was the failure to recognize this distinction which led the Court of Appeals of the District of Columbia into error."

The decision of this court reversing the decision of the Court of Appeals of the District, did not go to the merits, the holding being based upon the conclusion that mandamus was not a proper remedy to review the determination of the Secretary as to the qualifications of interest beneficiaries. Thus this court said:

"Where the duty in a particular situation is so plainly prescribed as to be free from doubt and equivalent to a positive command it is regarded as being so far ministerial that its performance may be compelled by mandamus, unless there be provision or implication to the contrary. But where the duty is not thus plainly prescribed but depends upon a statute or statutes the construction or application of which is not free from doubt, it is regarded as involving the character of judgment or discretion which cannot be controlled by mandamus."

Following this statement, the court says:

"The only question open in this proceeding is whether the decision of 1927 was given in the discharge of a ministerial duty controllable by mandamus or of a duty requiring the exercise of judgment or discretion not thus controllable."

The court then determined that the decision of the Secretary was given in the performance of a duty requiring the exercise of judgment or discretion not controllable by mandamus, saying:

"The questions mooted before the Secretary and decided by him were whether the fund is a tribal fund, whether the tribe is still existing, and whether the distribution of the annuities is to be confined to members of the tribe, with exceptions not including the relators. These are all questions of law, the solution of which requires a construction of the act of 1889 and other related acts. A reading of these acts shows that they fall short of plainly requiring that any of the questions be answered in the negative and that in some aspects they give color to the affirmative answers of the Secretary. That the construction of the acts in so far as they have a bearing on the first and third questions is sufficiently uncertain to involve the exercise of judgment and discretion is rather plain. The second question is more easily answered, for not only does the act of 1889 show very plainly that the purpose was to accomplish a gradual rather than an immediate transition from the tribal relation and dependent wardship to full emancipation and individual responsibility, but Congress in many later acts—some near the time of the decision in question—has recognized the continued ex-



istence of the tribe. This recognition was respected by the Secretary, and is not open to question here."

In a concluding paragraph of the opinion (281 U. S. 222), the court says:

"The time fixed for the final distribution is as yet so remote that no one is now in a position to ask special relief or direction respecting that distribution."

We believe we are justified in assuming from this opinion that the court would have similarly disposed of an application for mandamus to reverse the earlier holding to the effect that the interest annuities were payable to enrolled Chippewas and their issue, without regard to tribal membership.

With reference to the remark by this court to the effect that later Acts of Congress recognized the continued existence of "the tribe," attention is invited to the fact that the thirteen bands which constituted the so-called "tribe" were the settlers, not the beneficiaries of the trust, the ultimate beneficiaries being "all said Chippewa Indians and their issue then living." We think it will be conceded that the character of the plaintiffs' funds as tribal or non-tribal, and the right of Congress to control the same in the exercise of its plenary power, became fixed and determined as of the effective date of the agreements entered into under the Act of 1889, whereby the Indians expressed their assent to, and carefully defined, the disposition to be made of their lands, and the proceeds thereof. If the funds and the rights of the beneficiaries as described and provided for in those agreements were not *then*, under the terms of the agreements, tribal and subject to the plenary power of Congress, certainly Congress could not by the mere later recognition of the continuance of the tribal status of the bands with which

it had dealt (and whose tribal titles had, by the express terms of the Act, been "completely extinguished" in 1890), change the terms of the assent given by the Indians, or the character of the funds set up as provided in the agreements, and thus render them subject to its plenary control.

We submit that the net result of litigation, which culminated by the decision of this court in the *Kadrie* case, is a holding by this court (1) that the ruling by the Secretary of the Interior that *the interest annuities* should be confined to persons who had maintained tribal relations, was not so clearly wrong that it could be controlled by mandamus, and (2) that the question of whether the final distributees were confined to tribal members was not before the court.

The conclusion of the Court of Appeals of the District that these ultimate distributees were not tribal or confined to members of any tribe or band was not questioned by the Secretary or the Attorney General on the appeal to this court, and was not criticized or passed upon by this court in any manner. While the judgment of that court was reversed because of its misconception of the scope of the remedy of mandamus, its conclusion as to the non-tribal character of the class entitled to share in final distribution—"said Chippewa Indians, and their issue then living"—remains as the opinion of the highest court which has passed on the merits of this question.

In *Gritts vs. Fisher*, 224 U. S. 640, the legislation considered by the court dealt with lands described by the court as "belonging to the tribe as a community, and not to the members severally or as tenants in common." It had been conveyed to "The Cherokee Nation" by patent. The original Act looking toward its distribution (Act of July 1, 1902, 32 Stat. 725) provided for allotments to each "citizen" of the tribe as of September 1, 1902, and expressly excluded all

children born thereafter from participation in "the tribal property." The Act further provided for the termination of the tribal government on March 4, 1906, and the distribution of "*tribal funds*" to *enrolled members of the identical tribe* which held the tribal title. The Act expressly provided (Section 31) that no person not enrolled should be entitled to "participate in the distribution of the common property of the tribe." Thus under the express language of the Act the property and rights dealt with, including the *right to receive shares on final distribution*, were expressly and admittedly tribal, and depended on tribal membership.

On March 4, 1906, the rolls as of September 1, 1902, had not been completed. Some enrollees had not selected allotments, and some allotments already made were involved in litigation. Further, "the tribal council of the Cherokees had requested that children born after September 1, 1902, and prior to March 4, 1906, be admitted to participate in the allotment and distribution of *tribal lands and money*" (224 U. S., at 645). Therefore, on March 2, 1906, Congress, by joint resolution provided that the tribal government should be continued until all tribal property should be distributed to individual members and then by Act of April 26, 1906 (34 Stat. 37), as amended June 21, 1906 (34 Stat. 325, 341, c. 3504), in compliance with the request of the tribal council, expressly authorized participation by all children born into the tribe prior to March 4, 1906, and authorized the enrollment of such children as tribal members.

Appellants, who had been enrolled in 1902, contended that the Act of 1906, in including children born after September 1, 1902, arbitrarily took from persons enrolled as of September 1, 1902, rights vested in them by the earlier Act, taking property which was theirs, and giving it to others.

In *Cherokee Intermarriage Cases*, 203 U. S. 75, 93, the

Act of 1902 had been held by the court to have none of the elements of an agreement, pointing out that "a majority of the native Cherokees voted against its acceptance," and that "it is only an Act of Congress and can have no greater effect."

On this state of the record the court in *Gritts vs. Fisher* held that the Act of 1902 created no vested individual rights in the undistributed tribal property, and sustained the Act of 1906 on grounds stated on page 648 of the opinion as follows:

*"The difficulty with appellant's contention is that it treats of the Act of 1902 as a contract when it is only an Act of Congress and can have no greater effect.*

\* \* \* It was but an exertion of the administrative control of the government over the *tribal property of tribal Indians*, and was subject to change by Congress at any time *before it was carried into effect*, and while the tribal relations continued. \* \* \* *The council of the tribe asked that this be done* and we entertain no doubt that Congress in acceding to the request was well within its power."

The court further says in the concluding sentence of the opinion:

*"It is not to be overlooked that those for whose benefit the change was made in 1906 were not strangers to the tribe but were children born into it while the tribe was still in existence, and while there was still tribal property whereby they could be put on an equal or substantially equal plane with other members."*

*Sizemore vs. Brady*, 235 U. S. 440, involved a similar situation. The lands and funds involved were those of the Creek nation. Of them the court says (p. 441):

"Anterior to the legislation which we must consider the Creek lands and funds belonged *to the tribe as a community*, and not to the members severally or as tenants in common."

The legislation considered was Act of March 1, 1901 (31 Stat. 861, c. 676), called the "Original Creek Agreement." That Act provided for the allotment of "*all lands of said tribe* (with certain exceptions for townsites, schools, etc.) *among citizens of said tribe*" (Sec. 3, Act of March 1, 1901) with appropriate regard for their value. As the court says, the Act further provided (Sec. 27) for using tribal funds in equalizing allotments, and *for distributing what remained* to citizens of the Creek nation.

The Act in question was, therefore, one merely providing for the prompt distribution of all tribal property solely to tribal members. There was no indication that any but tribal Indians should share in the fund, no provision for the transfer of the tribal title to the United States or anyone else prior to distribution, nor any provision indicating that the purely tribal title and ownership in common should be changed or impaired in any way, until distributed to individual members.

The Act as originally passed provided that all "citizens" of the tribe should be enrolled as of April 1, 1899, and that as to any citizen dying after that date and before distribution to him, his share should be allotted and distributed to "his heirs according to the laws of descent and distribution of the Creek nation." By an amendment of the original Act adopted May 27, 1902 (32 Stat. 258), and ratified by the tribe, this provision was repealed and it was provided that any such decedent's share should go to his heirs under Arkansas law.



A "citizen" of the tribe having died on March 1, 1901, and no distribution having been made to his heirs prior to the amendment of 1902, the question was as to whether the heirs under Creek or Arkansas law took his still undistributed share of the tribal property. The court merely held that in providing for the orderly distribution of this tribal property to tribal Indians, Congress did not divest it of its tribal character except as the transaction was consummated by actual individual distributions. Thus the court says:

"There was nothing in the agreement indicative of a purpose to make a grant *in praesenti*. On the contrary, it contemplated that various preliminary acts were to precede any investiture of individual rights. The lands and funds to which it related were tribal property, and only as it was carried into effect were individual claims to be fastened upon them. Unless and until that was done Congress possessed plenary power to deal with them *as tribal property*. It could revoke the agreement and abandon the purpose to distribute them in severalty, or adopt another mode of distribution, or pursue any other course which to it seemed better for the Indians. And without doubt it could confine the allotment and distribution to living members of the tribe, or make any provision deemed more reasonable than the first for passing to the relatives of deceased members the lands and money to which the latter would be entitled, if living. In short, the power of Congress was not exhausted or restrained by the adoption of the original agreement but remained the same thereafter as before, save that rights created by carrying the agreement into effect could not be divested or impaired. *Choate vs. Trapp*, 224 U. S. 665, 671, 56 L. ed. 941, 944, 32 Sup. Ct. Rep. 565."

In consequence the court concluded that Congress was empowered to make the amendment and the Arkansas heirs prevailed.

In both *Gritts vs. Fisher* and *Sizemore vs. Brady* the entire transaction was one carried out solely under the plenary power. Neither act is sustained as an agreement assented to by the Indians but solely as "an Act of Congress" with no greater effect. Each Act involved in these cases was an appropriate exercise of that administrative plenary power because it merely provided, under reasonable rules and regulations, for the distribution of tribal assets solely to members, as such, of the one tribe which in each instance held the common Indian title. There was not involved in either case any question of admitting other tribes or bands to the benefits of reservations held exclusively by the Cherokee or Creek nations—no such "giving of the lands of one band or tribe to another" as was effected under the Chippewa Act of January 14, 1889, and which required, as this court held, the assent of each band.

Since, in the cases cited, Congress was thus merely exercising its plenary administrative control over tribal property, it could, so long as the property remained tribal—(i. e., except as portions were actually distributed—so that the common tribal title thereto was replaced by non-tribal rights)—continue to exercise its plenary control over the undistributed common tribal estate, and might change and modify the rules governing its distribution.

We have no quarrel with this result. But we submit that these decisions cannot be invoked to sustain the contention that Congress retained plenary control over the common proceeds of the separate reservations ceded by the various Minnesota bands under the Act of 1889 for the express purpose of "breaking up tribal relationships and ownership in

common," where the agreement and assent of the Indians was necessary to the validity of what was done and where those agreements provided for the ultimate distribution of those proceeds to "said Chippewa Indians and their issue then living," a class of individuals wholly different from the ceding tribal units and having no tribal characteristics whatever, and not confined to tribal members.

Attention is invited to the fact that even under the rules announced in *Gritts vs. Fisher* and *Sizemore vs. Brady* the exercise of the plenary power is carefully and expressly limited to situations where there was still tribal property for distribution, and that "*rights created by carrying the agreements into effect could not be divested or impaired*" (*Sizemore vs. Brady, supra*). Thus a Creek Indian to whom an allotment had already been made, and for whom the allotted lands were held by the United States under trust patent, could not have been deprived thereof under the plenary power.

We respectfully urge that when the President on March 4, 1890, approved the Chippewa agreements of cession, which thereupon operated "as a complete extinguishment of the Indian title without any other act or ceremony whatever" (Sec. 1, Act of January 24, 1889, R. 37), the transaction contemplated by the Act of 1889 was "carried into effect," and that the rights of members of the non-tribal class designated to ultimately receive the proceeds of the distribution of the ceded lands were no longer subject to impairment under the plenary power of Congress over tribal property.

One further argument advanced by the government before the Court of Claims should be dealt with before leaving the discussion of the construction of the Act of 1889 and of the intent of the parties to the agreements entered into "for the purposes and upon the terms stated in that Act." It was

urged below that the circumstances of the Indians were such that neither the government nor the Indians could have intended that the proceeds of the ceded lands be placed beyond the power of Congress to expend the same as it saw fit in connection with these Indians and their affairs.

This argument was advanced although there can be no claim that any of the provisions of Section 7 of the Act governing the disposition of the funds during the trust period are ambiguous or uncertain, or require construction. Section 7 of the Act (R. 40) clearly permitted invasions of the "permanent fund" only for (1) reimbursement and deductions for expenses incurred by the government in carrying out the Act, (2) reimbursement to the government for the advances of interest contemplated by the Act, and (3) the disbursement of not more than 5% of the total fund under the "reserved power to make limited appropriations" for the purpose of "promoting self-support and civilization." None of these provisions being ambiguous or susceptible of different meanings, there is no occasion to resort to the circumstances of the parties as an aid to construction.

Moreover, if the circumstances be resorted to, they fail to sustain the position taken. If the fund had been handled as proposed, the interest and "support and civilization" provisions would have been ample.

During the negotiations which culminated in the agreements in question, the Commissioners advised the Indians that the pine lands alone, without regard to the proceeds of the agricultural land, were estimated to "reach in value from 25 to 50 millions of dollars" (Report of Commissioners negotiating the agreements under the Act of January 14, 1889, to the Secretary of the Interior dated December 26, 1889, H. R. Ex. Doc. 247, 51st Congress, First Session, page 7). This would have produced interest available for the

*education and support of these Indians in an amount exceeding \$1,250,000 annually.*

While this forecast proved excessive, the total credits to the fund totalled \$17,662,325.70 (Finding 13, R. 47). The first substantial withdrawals from the fund occurred in 1911, when defendant reimbursed itself for its interest advances (Finding 8, R. 43), for its expenses in carrying out the Act (\$328,163.95), and for other expenditures of kinds not contemplated by the Act in the sum of more than \$2,000,000 (Finding 9, R. 45). Thereafter, substantial expenditures were made directly from the fund itself, the details of which appear in Finding 19 (R. 53).

During the entire period from 1890 to 1927, the withdrawals made from the fund which were of the kinds contemplated under Section 7 of the Act of 1889 did not total more than \$2,500,000 made up approximately as follows:

(1) That part of the 1911 reimbursement which represented items properly chargeable to the expense of carrying out the Act of 1889 (Finding 9, R. 46) .....	\$ 328,163.95
(2) That part of the 1911 reimbursement for advance interest which was properly taken from the permanent fund (Findings 7 and 8, R. 43-4) .....	664,235.72
(3) Later withdrawals for items charged as expenses in carrying out the Act of 1889 (Finding 19, R. 53) .....	669,606.34
Total .....	\$1,662,006.01

Deducting this total of authorized reimbursements for advance interest and for expenses in carrying out the Act from the total credits to the fund (\$17,662,325.70) leaves



almost exactly \$16,000,000 as the net principal of the fund. Of this amount, Congress was authorized to expend not more than 5%, or \$800,000, "for promoting self-support and civilization," which, when added to the above \$1,662,006.01 for expenses and advance interest, would bring the total of all reimbursements and expenditures which were in fact made, and which under Section 7 of the Act of 1889 were to be withdrawn from principal, to \$2,462,006.01.

This amount deducted from \$17,662,325.70 of principal credited to the fund would have left a principal fund of over \$15,000,000 drawing interest at 5%, or \$750,000 a year, and would have provided a total of \$12,000,000 in interest payments alone during a sixteen-year period without any invasion whatever of principal.

During the sixteen-year period from 1912 to 1927, inclusive, the actual disbursements from principal were only \$8,455,022.19 (Finding 19, R. 53). The last quoted figure included \$669,606.34 which, as above indicated, was expended by the defendant in carrying out the provisions of the Act of 1889, and already deducted from the principal of the fund in the above computation. Of the balance so disbursed, \$800,000 was available for disbursement under the "reserved power to make limited appropriations" to the extent of 5% of the principal, and has likewise been already deducted as above indicated. Deducting these items which were authorized under the provisions of Section 7 of the Act of 1889, from the total disbursements of \$8,455,022.19, we have less than \$7,000,000 as the total expended during the sixteen-year period for purposes not contemplated by the Act of 1889. This is the total which Congress deemed necessary to spend out of the principal fund for these Indians, although it apparently believed that it possessed full plenary power to expend any part of the fund for any Indian purpose. Dur-

ing the same period the permanent fund in fact averaged less than \$5,000,000 (Tabulation, Finding 15, R. 50), and hence at 5% yielded less than \$250,000 per annum in distributable interest, or less than \$4,000,000 in interest for the sixteen-year period. Adding this to the \$7,000,000 expended out of principal during the same period by Congress under its assumed plenary power, we have \$11,000,000. As we have seen, the fund, if administered in strict accordance with the trust, would have produced over \$12,000,000 in interest alone during the sixteen years.

We have, then, this situation. The bands of Chippewa Indians in 1889 held their reservations, but derived substantially no income therefrom. It was estimated that the disposal of the lands would produce a fund sufficient to yield \$1,250,000 per year in interest to provide for the education and support of the Indians. The disposal of the lands actually yielded enough so that if the fund had been administered in accordance with the agreements, it would have produced \$750,000 per year in interest, or in a sixteen-year period approximately \$12,000,000.

During the sixteen-year period from 1912 to 1927, inclusive, the total distributions from principal which were not contemplated by the Act of 1889 and the agreements, and which were made by Congress under the assumption that it had complete plenary power, totalled less than \$7,000,000, and the actual interest accruing was less than \$4,000,000.

If it were true that the Act of 1889 and the agreements were to any extent ambiguous as to the authorized disbursements from the "permanent fund" so that extraneous evidence might be resorted to as an aid to construction, certainly we would be justified in resorting to what was said between the parties at the time the agreements were being negotiated. Very extensive reports of the council meetings

which resulted in these agreements appear in H. R. Ex. Doc. No. 247, 51st Cong., First Session (Cong. Doc. Ser. No. 2747). This officially printed public document consists of the message from the President transmitting the approved agreements to Congress with the report of the Secretary of the Interior to the President as to the negotiation of the agreements and the report of the Commissioners appointed to negotiate the agreements, together with stenographic reports of the councils which they held. From this document it appears that H. M. Rice, Chairman of the Commission, addressing the Third Council held at Red Lake on July 3, 1889, said to the Indians:

"The second thing is, that the rest of the land which is now being used up, stolen from you, or burnt off will be taken hold of by the Great Father for his children. He will sell your pine at the highest price he can get for it, and he will hold that money for fifty years and pay you the interest yearly. At the end of that time he will divide that principal sum among you and your children. The Great Father would be willing to give you that money at once if you could only make good use of it, but he hopes that after fifty years your children will be able to receive the money and do well with it."

H. R. Ex. Doc. 247, *supra*, page 71.

Surely no inference is to be gathered from this language that the major part of the fund was to be subject to be disbursed for the support of Indians during the fifty-year trust period.

Again addressing the First Council at White Earth Reservation, Mr. Rice said:

"At the end of fifty years the principal is to be divid-

ed equally among those who shall be then living. To provide for the breaking of land, building of houses, purchasing of cattle and horses, and everything of that kind that you may need for your advancement, there is a clause providing that Congress may, in its discretion, from time to time during the said fifty years appropriate for the purpose of promoting civilization and self-support among the Indians a portion of said principal sum, not exceeding 5 per cent thereof. In case of the failure of crops or any unforeseen misfortune here is a storehouse of money to be drawn upon for your wants."

H. R. Ex. Doc. 247, *supra*, page 88.

Here again there is no question of the distribution of principal until the end of the trust period. It is to the "reserved power to make limited appropriations" that Commissioner Rice refers as affording a means for combatting "failure of crops or any unforeseen misfortune."

The idea of the Indians as to the meaning of the Act and agreements in this regard was well expressed by the old Chief Wob-On-Ah-Quod at the Ninth Council at White Earth when, in the course of a long address explanatory of the Act, he said:

"I am on the brink of the grave, and I leave this as a legacy to you. It is, as it were, my last will and testament. \* \* \* Many of you who are listening to me will not see the end of the fifty years mentioned in the bill, but those who are then alive will see the benefits that will accrue from this agreement. Those we leave behind us will see those benefits, but many that I see will fall before that time. So we can only bear in mind that we have done our best for our posterity."

H. R. Ex. Doc. 247, *supra*, page 116.

Throughout the entire negotiations, the idea is implicit that the proceeds of the disposal of the ceded lands were to constitute a "*permanent fund*," to inure at the end of the trust period to "*posterity*."

We again urge that the Act of 1889 and the agreements which ratified and accepted that Act are wholly free from ambiguity as to the disposition to be made of the so-called "*permanent fund*."

However, if resort to surrounding circumstances and negotiations is made, we submit that there is nothing in this record to indicate that either the Indians or the government, at the time the agreements were entered into, had any reason to believe that the annual interest, plus the distributions under the "*reserved power to make limited appropriations*" would be insufficient for their care and support. The Court of Claims well said (R. 59) :

"Doubtless it was the belief of Congress that the income from the fund that was to be disbursed to the Indians annually during the fifty-year period would be sufficient, along with their individual landed estates, to maintain them, and at the same time would encourage the adoption of the ways of the Whites for themselves and future generations."

We submit further that the negotiations clearly indicate that each party regarded the "*permanent fund*" as a thing to remain intact for posterity. The idea that this fund was subject to be dissipated in per capita payments to individuals during the life of the trust, or that Congress might elect to pay from this principal such items as the cost of the operation of its Indian service in Minnesota, finds no support whatever either in the Act itself, the agreements of cession, the circumstances of the Indians, or the interpretation



placed upon the Act by the Commissioners and chiefs who conducted the negotiations.

### III.

#### The Claims Asserted.

Specific dispositions of portions of the "permanent fund," for purposes not authorized by the terms of the agreements of cession, are summarized in the "Statement of the Case," *supra*.

If these constitute "unlawful" dispositions of this trust fund, judgment for the amount so "unlawfully appropriated or disposed of" is expressly authorized and directed by Section 4 of the Special Jurisdictional Act (R. 34), and the amount recovered is to be dealt with like the balance of the trust corpus (Sec. 10, *id.*, R. 5).

As to these dispositions of the fund the court below clearly recognized (R. 58) that "the defendant has depleted the trust fund by various disbursements to the Indians" \* \* \* *for purposes not mentioned in the Act of 1889 and contrary to the terms of the alleged trust agreement.* Recovery, as to the major items, was denied below solely on the ground that these disbursements were made pursuant to appropriations by Congress, in the exercise of its plenary power over tribal properties, and hence these diversions of the trust principal, though admittedly "*contrary to the terms of the trust,*" were not "*unlawful.*"

Conversely, the Court of Claims also clearly recognized that, if this plenary power did not extend to the "permanent fund" created under the Act of 1889, recovery should be had, saying (R. 68) :

"As previously stated, the plaintiffs' case rests upon a lack of Congressional authority to take from the funds

created by the act of 1889 any sum not expressly stated to be reimbursable. If this is the principle of established law, manifestly the plaintiffs are entitled to recover."

The question of whether the plenary power of Congress extended to the principal fund here involved has been discussed. This section of the argument will be confined to a consideration of the classes of disbursements from the "permanent fund" which were authorized by the agreements of cession, and a discussion of some of the unauthorized purposes for which the "permanent fund" was in fact dissipated.

*A. Dispositions of the Trust Fund Authorized by the Agreements of Cession.*

As we have seen, the terms of the trust as to the disposition of the "permanent fund" are set forth and clearly defined in Section 7 of the Act of January 14, 1889, which (with the balance of that Act) was expressly made a part of each agreement with the Indians. Section 7 appears in full in the petition (R. 11), in the findings below (R. 40), and appears again in full in the opinion of the Court of Claims (R. 57), and need not be again reprinted here. Its clear provisions may be outlined as follows:

A fund, repeatedly referred to as a "permanent fund," is to be created by the deposit in the Treasury of the United States "to the credit of the Chippewa Indians in the state of Minnesota" of the proceeds of the disposal of all the ceded lands. This fund is to draw interest at the rate of five per cent per annum. The interest is to be expended annually, one-fourth for a system of Indian schools, and three-

fourths in annual per capita distributions to "said Indians."

The cash proceeds of the lands constitute the corpus of the trust—the "permanent fund"—and are to be applied as follows:

A. There are to be "*deducted*" from the proceeds of the disposal of the ceded lands before they are placed in the "permanent fund" certain specified expenses, *i. e.*:

(1) Expenses of "*making the census*" (referring to the classified census and roll of the Indians provided for in Section 1 of the Act).

(2) Expenses of "*obtaining the cession and relinquishment*" (referring to securing from the Indians the agreements of cession above referred to).

(3) Expenses of "*making the removal and allotments*" (referring to the removal of Indians from ceded lands to the unceded part of the White Earth Reservation, and making individual allotments to all the Indians as per Section 3 of the Act).

(4) Expenses of "*completing the surveys and appraisals*" (referring to the surveys and appraisals required by Section 4 of the Act as a preliminary to classification and sale of the ceded lands).

B. "Congress may in its discretion from time to time during said period of fifty years appropriate for the purpose of promoting civilization and self-support among said Indians, a portion of said principal sum not exceeding five per centum thereof."

C. "Whenever said permanent fund shall exceed

three million dollars, the United States shall be fully reimbursed, out of such excess for:

(1) "all the *advances of interest made as herein contemplated*, and

(2) "other expenses *hereunder*."

The "*advances of interest made as herein contemplated*," and for which defendant was entitled to reimbursement under C (1), *supra*, are defined and limited in the section in the following language:

"The United States shall, for the benefit of said Indians, advance to them as such interest as aforesaid the sum of ninety thousand dollars annually \* \* \* until such time as said permanent fund, exclusive of the deductions hereinbefore provided for, shall equal or exceed three million dollars, *less any actual interest that may in the meantime accrue from accumulations of said permanent fund*."

The trust is to continue for "the period of fifty years after the allotments provided for in the Act have been made" and "at the expiration of said fifty years, said permanent fund shall be divided and paid to *all of said Chippewa Indians and their issue then living in equal shares*."

As we have seen the entire transaction depended upon the assent of each of the ceding bands for its validity. Under the complete and unambiguous language of Section 7 the only dispositions of the "permanent fund" authorized by the agreements of cession—the only dispositions of that fund to which the necessary assent of the ceding bands was ever given—may be simply classified as:

(1) Expenditures made in carrying out the Act.

- (2) Reimbursement for interest advanced "as herein contemplated."
- (3) Expenditures not exceeding 5% of the fund made pursuant to the "reserved power to make limited appropriations" for "promoting civilization and self-support."
- (4) Ultimate per capita distribution at the end of the trust period to "said Chippewa Indians and their issue then living."

*B. Excess Reimbursement for Advance Interest.*

As above stated Section 7 authorized the defendant, whenever the fund exceeded \$3,000,000, to reimburse itself out of the trust fund for its "advances of interest *made as herein contemplated.*"

The advances "herein contemplated" were limited to "ninety thousand dollars annually \* \* \* *less any actual interest that may in the meantime accrue from accumulations of said permanent fund.*"

The obvious intent of these provisions was that the principal or "permanent" fund should be reduced only to the extent that the total interest distribution effected under this provision during any year exceeded the interest accruing during that year. So far as interest accrued, it was to be applied to reduce the amount advanced, and only the excess was chargeable to principal.

Appropriations of \$90,000 per year for advance interest were made by Congress for each of the years 1891 to 1911, inclusive (Finding 7, R. 44) under appropriating acts providing in substance that expenditures thereunder "shall be repaid into the Treasury of the United States in accordance with the provisions of the Act of January 14, 1889" (Opinion below, R. 66).



These appropriations totalled \$1,890,000. The total amount disbursed as advance interest pursuant thereto was \$1,860,079.85. *The total amount of "actual interest in the meantime accruing" on the permanent fund was \$2,048,348.76 (Finding 7, R. 44; tabulation, omitting fiscal year 1912).*

During every year after 1904 the actual interest accruing exceeded the amount disbursed as advance interest, but during each of the years 1891 to 1904, inclusive, the disbursements of advance interest exceeded the actual interest accruing. During those years the advances aggregated \$999,134.02, while the total of the accruals of actual interest during the same years was \$334,898 (Finding 7, R. 44). In consequence, *the total amount so disbursed during those years exceeded the corresponding accruals by \$664,236.02. This is the maximum amount authorized to be charged to the principal fund.*

Defendant kept the accounts of this trust in two separate funds, one known as "Chippewas in Minnesota Fund," which was the interest bearing "permanent fund"—the principal or corpus of the trust—and the other designated as "Interest on Chippewas in Minnesota Fund," to which the interest actually accruing was credited (Finding 6, R. 43).

In 1911 defendant's officers, in attempted compliance with the direction contained in the appropriating acts above referred to, assumed to cause the interest advances to be "repaid into the Treasury of the United States in accordance with the provisions of the Act of January 14, 1889." As pointed out above, the actual interest accruals to that date amounted to over \$2,000,000, and exceeded the total amount disbursed as advanced interest to that date. It was apparently realized that the interest fund should stand at least part of the reimbursement, and as a result, in effecting re-

imbursement for the \$1,860,000 expended as advance interest, the sum of \$896,246.93 was taken from the "Chippewas in Minnesota" or permanent fund, and the balance from the interest fund (Finding 8, R. 45).

Since, as above indicated, the provisions of the Act of January 14, 1889, authorized advance interest reimbursement out of principal only to the extent that advances of interest exceeded the actual accruals of interest, and the total amount of this excess was only \$664,236.02 (*supra*) the withdrawal from the permanent fund of \$896,246.93, resulted in an unauthorized depletion of that fund in the sum of \$232,010.91.

It is to be noted that, for this unauthorized disposition of the "permanent fund," the claimed defense based upon the exercise of the plenary power of Congress is not available. Congress had ordered reimbursement only in accordance with the provisions of the Act of January 14, 1889. The wrongful diversion was apparently due to an administrative error, resulting in the reimbursement from the principal fund, of \$232,010.91, which should have come from the interest fund.

Of this situation the Court of Claims says (R. 67):

"Obviously, if Congress had been aware of the extent of interest accumulations it could have omitted these advance appropriations at least eight years sooner.

"While technically it may be asserted that Congress did not strictly observe the provisions of the Act of 1889, it is indisputable that the present plaintiffs suffered absolutely no loss."

It is true that the interest fund benefited by this error to the same extent as the "permanent fund" suffered. But the interest fund was, as the Act provided, distributed

annually three-fourths in per capita payments to then living Indians, and the balance for schools. It accrued, and has been distributed, solely for the benefit of the then interest beneficiaries, *the class entitled to share in the income of the trust.*

As to this claim, defendant is, therefore, in the position of a trustee who has mistaken principal for income, and has, in consequence, erroneously distributed, to the class entitled to receive only current distributions of net income, property which should have been conserved for those entitled to receive the corpus on the termination of the trust.

In a duly authorized representative suit, brought in behalf of the latter class, to compel the restoration to principal of sums thus unlawfully distributed, the trustee cannot, during the life of the trust, defend upon the sole ground that possibly some of the beneficiaries of his error may, by survivorship, become entitled to participate in the final distribution. While the trust continues, the amounts unlawfully distributed belong in the trust, and it is the trustee's duty to restore them. See Subdivision III of this brief (*infra*) as to appellants' right to this remedy.

C. *Reimbursement for Expenses Not Connected with Carrying Out Act of 1889; Agency Expenses.*

Finding No. 9 (R. 45) reads as follows (*italics added*):

"In each of the years 1890 and 1892 to 1910, inclusive, Congress made appropriations out of public funds in the total sum of \$2,350,559. The purpose was stated in the following (or comparable) words: *To enable the Secretary of the Interior to carry out an Act entitled "An Act for the relief and civilization of the Chippewa Indians in the State of Minnesota, and for*

other purposes," approved January 14, 1889. Each of the appropriation acts directed that expenditures thereunder should be reimbursed to the United States from the proceeds of sales of land ceded by the Chippewa Indians under the act (of 1889) or out of the proceeds of sale of their lands. These appropriations were carried to the account entitled Relief and Civilization of Chippewas in Minnesota (Reimbursable).

During the fiscal years 1891 to 1913, inclusive, expenditures in the total sum of \$2,338,625.32 were made under authority of the Secretary of the Interior for the use and benefit of these Indians. Included in the total were expenditures amounting to \$328,163.95 made for expenses of the Chippewa Commission; for surveying, allotting sale, etc., of lands; for expenses, care, and sale of timber; for removals; for transportation; etc., of supplies; for councils and delegations, and for examining and appraising land. The balance of the total sum, amounting to \$2,010,461.37, was expended for education, roads, bridges, clothing, provisions and other rations, agricultural implements and equipments, work and stock animals, feed and care of livestock, hardware, glass, oils and paints, medical attention, Indian houses, household equipment, fuel and light, hospitals and equipment, pay of mechanics, miscellaneous employees, agricultural aid, miscellaneous agency expenses, agency buildings and repairs, saw and grist mills, miscellaneous building material, pay of farmers, burial of Indians, care of indigent Indians, telephone lines, boats, docks, etc., per capita cash payments, pay of agents and sub-agents, pay and expenses of Indian police, and annual celebration of the White Earth band.

Reimbursent for all these expenditures was taken

from the 'Chippewas in Minnesota Fund,' as follows: On May 16, 1911, \$2,196,036.63; on June 11, 1912, \$139,550.59, and on May 26, 1913, \$3,241.27, making a total of \$2,338,828.49."

The amounts expended for these various purposes appear in Finding No. 10 (R. 46). By Section 7 of the Act of January 14, 1889, defendant was authorized to deduct from the proceeds of the disposal of the lands "all the expenses of making the census, of obtaining the cession and relinquishment, of making the removal and allotments, and of completing the surveys and appraisals in this act provided," and was further authorized to reimburse itself out of that part of the fund in excess of \$3,000,000.00 for "All the advances of interest made as herein contemplated and other expenses hereunder."

It will be noted that the expenses for which reimbursement was authorized are carefully confined to expenses incurred in carrying out the provisions of the Act of January 14, 1889.

That this was the exact intent of Congress is evidenced not only by this plain language, but also by the report of the house committee reporting this bill for passage (H. R. Rep. No. 789, 50th Congress, 1st Session, p. 6) in which one of the objects of the bill is stated to be "to give all the Indians the *entire* benefit of the proceeds of the lands, *less the necessary expenses attending their survey, appraisal and disposal.*" (Italics ours.)

As stated in Finding 9 (*supra*) the appropriating acts here involved recognized this limitation and appropriated these funds "to enable the Secretary of the Interior to carry out" the Act of 1889.

Appellants do not question the right of the United States

to reimburse itself out of the "permanent fund" for \$328,163.95 thus expended for the expenses of the Chippewa Commission and for the survey, appraisal and disposal of the ceded lands. These are expenses in carrying out the Act, which were authorized charges against the fund. The balance, having no connection with such expenses, was improper.

As to this claim, appellants rely not only upon the plain limitation in Sec. 7 of the Act of 1889; but upon the rule well stated in "*Digest of Decisions of Second Comptroller of the Treasury*" (1884-1893), Vol. 3, p. 187, as follows (italics ours):

"Where Indian lands were ceded to the United States to be surveyed and sold as other public lands are surveyed and sold, the proceeds of such sales as they accrue, after deducting all expenses incident to the proper execution of the trust, to be deposited to the credit of said Indians: HELD that the United States was entitled to reimbursement for any and all expenses incurred in excess of amount that would have been necessary had no Indian lands been sold; that it was incumbent upon the trustee through its officers to keep a separate account of expenses incurred by reason of the sale of Indian lands, so that the exact amount of such expenses could have been ascertained without resort to computation based on probabilities more or less uncertain; that where this had not been done it was not the fault of the Indians, and that if reasonable doubts arise as to the proper expenses to be charged to them, said doubts must be resolved in their favor."

This statement by the comptroller merely applies to the United States, when acting as trustee for its dependent



Indian wards, the same measure of responsibility and the same duties which would be imposed by a court of equity upon a private trustee.

Let us examine one or two of the larger items involved.

Under these appropriations made by Congress "To enable the Secretary of the Interior to carry out" the Act of 1889, large sums were expended for *education* and reimbursement was taken therefor from the "permanent fund." This item has no possible relation to any expense connected with the making of the census, obtaining the cessions, effecting the removals, making the allotments, completing the surveys and appraisals or any other expense of the defendant involved in the disposal of the ceded land or the administration of the resulting trust. In addition, as we have seen, Section 7 of the Act of January 14, 1889, contained express provision for education by providing that one-fourth of the interest on the trust fund should be devoted to the establishment and maintenance of a system of free schools among the Indians and for their benefit.

Out of moneys similarly appropriated the defendant *maintained its Minnesota Indian agencies, and in 1911 reimbursed itself therefor out of the permanent fund*, as shown by the following items for which reimbursement was taken (Finding No. 9, *supra*):

- Agency buildings and repairs.
- Pay of agents and subagents.
- Pay and expenses of Indian police.
- Pay of mechanics.
- Miscellaneous employees.
- Miscellaneous agency expenses.

These agencies did not have their origin with the Act of January 14, 1889, nor any substantial connection with it.

They were the long established instrumentalities of the government maintained at its own expense for the care of its Indian wards and the preservation of peace and order among them, and between them and their white neighbors.

The court will judicially notice that Indian Agencies had their origin in the forts and garrisons maintained by the War Department to control the Indians. Later the armed forces were succeeded by Indian Agencies but the Indian Agents remained Army Officers under the direction of the Secretary of War, and it was not until 1900 that defendant discontinued the policy of assigning Army Officers as Indian Agents.

This was the situation when these Indian bands were induced to cede their respective separate reservations for purposes carefully defined and limited in the Act of 1889 under agreements, binding on both the United States and the Indians, by which the United States agreed to effect the disposal of the lands, giving the Indians "the entire benefit of the proceeds of the lands less only the necessary expenses attending their survey, appraisal and disposal."

The Court of Claims says (Opinion R. 69):

"In 1911 Congress adopted the policy of defraying the expense of Indian agencies and other costs of governmental activities in Indian affairs, either in whole or in part, out of available Indian tribal funds. In this case Congress observed this policy and provided that sums expended for this purpose should be reimbursable. The plaintiffs contest the item by a contention predicated upon governmental policy obtaining in former years. We will not review the origin and purpose of Indian agencies; it is sufficient to state that Congress determines the Indian policy and we may not challenge it."


Thus the propriety of these reimbursements is sustained not upon any claim that the reimbursements in question represented items properly reimbursable under the terms of the trust, but solely upon the plenary power of Congress.

The question of whether this power applies at all to this fund has been discussed, *supra*. In addition, as shown by the Finding quoted, the appropriating Acts here involved did not purport to vary the terms of that Act. This money was expended "under authority of the Secretary of the Interior," pursuant to Acts of Congress which, in strict accordance with the agreements, appropriated the money so spent "to enable the Secretary of the Interior to carry out" the Act of 1889.

Even if the plenary power were applicable to these diversions of the trust fund, we suggest that the plenary power over tribal property is one which, theoretically at least, is to be exercised for the benefit of the Indians, and does not permit Congress, even when dealing with admittedly tribal property, to wholly disregard the rights of the Indians, or to deal with it as its own. *United States vs. Mille Lac Band*, 229 U. S. 498; *Lane vs. Pueblo*, 249 U. S. 110; *U. S. vs. Creek Nation*, 295 U. S. 103; *Chippewa Indians vs. U. S.*, 301 U. S., at 375. This being true we urge that even if the plenary power applied to this fund, Congress was without authority, in 1911, after entering into the solemn and binding agreements here involved, to effect the sudden change in policy described by the Court of Claims, and to elect to defray the expense of its own long established Indian Service out of the Chippewa "permanent fund." This was no act of guardianship. It was a deliberate appropriation of Indian funds to pay a governmental expense, a proceeding consistent only with absolute ownership.

Except for the item of \$328,163.95 above mentioned, none

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of the expenses reimbursed as shown in Findings 9 and 10 (R. 45-6), bear any possible relation to defendant's expenses under the Act of 1889. The position of the court below on this entire claim is as follows (R. 68) :

"The Act of 1889 contained certain provisions which obligated the Government to provide sufficient funds for administering the act, and for these sums the Government was to be reimbursed. Obviously, no additional legislation was required to authorize such reimbursements. The sums for which the Government took reimbursement, in addition to these, were appropriations made by Congress concerning the welfare and civilization of the tribe and providing that they should be reimbursed for the same.

The plaintiffs seek to limit this item to one expenditure for carrying out the Act of 1889 and object to treating the reimbursable items as a whole. This position is untenable. Congress retained its plenary power and authority over Indian tribal lands and funds and provided that the sums appropriated were to be reimbursed from the Indian funds. See Finding 9. \* \* \*

As previously stated, the plaintiffs' case rests upon a lack of Congressional authority to take from the funds created by the Act of 1889 any sum not expressly stated to be reimbursable. If this is the principle of established law, manifestly the plaintiffs are entitled to recover."

*D. Appropriations for Promoting Civilization and Self-support in Excess of 5% of Principal Fund.*

As pointed out above, Section 7 of the Act of January 14, 1889, contains the following provision:

"Congress may, in its discretion, from time to time during said period of 50 years, appropriate for the purpose of promoting civilization and self-support among said Indians, a portion of said principal sum not exceeding 5 per centum thereof."

The appropriations actually made by Congress out of the principal fund for this purpose vastly exceed, in total, 5% of the principal fund, and the sole question presented under this claim is as to the construction of the above provision of the Act.

It is the position of appellants that the total appropriations and withdrawals authorized by the above provision during the entire trust period were limited to a total not exceeding 5% of the permanent fund.

It was the apparent understanding of the Department of the Interior that the clause should be so construed as to permit appropriations in each fiscal year to an amount not exceeding 5% of the balance in the fund at the beginning of the year, or as if there were inserted, in the limiting portion, the words "in any fiscal year" so that it would authorize an appropriation of "a portion of said principal sum not exceeding in any fiscal year 5 per centum thereof." (See Tables in Finding 15, R. 49 showing that, while a total of \$2,754,500 was appropriated by Congress under the clause, the total expended in any fiscal year did not exceed 5% of the fund as the same existed at the beginning of the year.)



Evidently appreciating that there was no basis for this insertion in the plain language of the statute, the position taken by counsel for the United States before the Court of Claims, abandoned the "fiscal year" theory and contended that the 5 per centum limitation merely means that "each appropriation, made 'from time to time' should not exceed 5 per cent of the principal fund" (Defendant's Brief in Court of Claims, p. 197).

Holding, as it did, that Congress had full plenary power to expend these funds as it saw fit, with the result, as pointed out above, that this "reserved power in Congress to make limited appropriations" becomes a wholly meaningless surplusage, the court below did not resolve this controversy, but sustained all expenditures under appropriations for "promoting civilization and self-support" as legitimate exercises of this plenary power.

It is respectfully submitted that to hold that the proviso in question permitted either successive annual appropriations of 5% each (resulting in the possible exhaustion of this 50 year trust fund in 20 years) or successive appropriations of 5% each, made as fast as Congress could pass them, does violence to the obvious intent of both the United States and the Indian.

If it had been intended that the appropriations were to be 5% *per year* it would have been easy to have said so. There is not the slightest basis in the Act or the agreements for this construction.

If it had been intended that appropriations might be made as fast as the necessary legislation could be passed, so that, conceivably, the entire fund might have been exhausted in six months, then there is no conceivable reason why each act should have been limited to 5% of the fund.

Section 7 itself repeatedly refers to the principal trust

fund as a "*permanent fund*." It is provided that the proceeds of the disposal of the ceded lands shall be placed in the Treasury to the credit of the Indians "as a *permanent fund*"; that the "interest and *permanent fund* shall be expended for the ~~benefit~~ of said Indians in the manner following"; that at the end of said 50 years "said *permanent fund* shall be divided and, paid to all of said Chippewa Indians and their issue then living"; that interest shall be advanced by the government until "said *permanent fund*" reaches \$3,000,000; that such advances of interest shall be reduced by the interest actually accruing "from accumulations of said *permanent fund*," and reimbursement for expenses of carrying out the Act is authorized "whenever said *permanent fund* shall exceed the sum of \$3,000,000."

Any such construction as is now contended for by the United States does violence to any characterization of this fund as a "*permanent fund*" and to the entire theory of the Act under which, as we have seen, the Indians were to undergo a process of civilization for a period of fifty years, during which those from time to time in being were to receive the income from the fund, and at the end of the fifty-year trust period, when the process of civilization and disruption of tribal life and relationships was expected to be more or less complete, the survivors and the surviving issue of the Indians were to receive as their own the corpus of the trust.

In the negotiations with the Indians which led to the signing of the agreements of cession, the commissioners appointed by the President under the Act of 1889 explained this clause in the following language:

"There is a clause providing that Congress may, in its discretion, from time to time during the said fifty years, appropriate for the purpose of promoting civilization and self-support among the Indians, a portion of

said principal sum not exceeding 5% thereof. *In case of the failure of crops or any unforeseen misfortune, here is a storehouse of money to be drawn upon for your wants*" (H. R. Ex. Doc. 247, 51st Congress, 1st Session, p. 88).

It is respectfully submitted that there is no reason for so construing the clause as to subject to the discretion of Congress, during the entire trust period, more than the amount expressly stated in the Act itself, i. e., "a portion of said principal sum not exceeding 5 per centum thereof."

The total of all credits to the fund was, as above stated, \$17,662,325.70 (Finding 13, R. 47). If the "five per centum" is to be calculated on this total, then the maximum total amount authorized to be withdrawn from the fund under appropriations "for promoting self-support and civilization" was \$883,116.29.

The amount actually so withdrawn was \$2,526,267.64 (Finding 15, R. 49).

As above indicated, certain expenses under the Act of 1889, under the express language of Section 7, were to be "deducted" before the funds were established as a permanent fund, and a more nearly correct figure to which to apply the 5% is close to \$16,000,000, with a resulting authorized maximum to be withdrawn under such appropriations of about \$800,000.

Whether the authorized maximum be \$800,000 or \$883,000 need not be here determined. The larger figure was exceeded by more than a million and a half dollars, and the "permanent fund," to which the ultimate distributees are entitled, was to that extent reduced.

This excess having been "unlawfully disposed of" in violation of the terms of the trust, judgment therefor is expressly

authorized by Section 4 of the Jurisdictional Act (R. 34), and will be restored to the trust corpus under Section 10 of that Act.

#### E. *Miscellaneous Unauthorized Disbursements.*

In Finding No. 17 (R. 51) appears a list of miscellaneous disbursements which the Court of Claims expressly finds to be "amounts disbursed by defendant from said 'Chippewa in Minnesota Fund' other than amounts disbursed therefrom for purposes authorized by said Act of January 14, 1889." These disbursements total \$2,311,493.19.

While it does not appear from the finding, it should be stated that the amounts disbursed as shown by Finding 17 and here discussed were, for the most part, disbursed under "civilization and self-support" appropriations made under the "reserved power to make limited appropriations" for that purpose to the extent of 5% of the fund. In consequence, if plaintiffs' position as stated in the preceding subdivision is sustained, the claims here asserted may be disregarded. They become important only if it be held that what this court called a "reserved power to make limited appropriations" was in effect unlimited except as restricted to what might be properly expended "for promoting civilization and self-support." Appellants claim that a substantial part of these disbursements were not within this class.

For example, these expenditures include, as in the case of the reimbursement discussed, *supra*, the expense of operating defendant's Indian service in Minnesota, an administrative governmental activity of long standing, which, prior to 1911, was financed, like other expenses of government, out of public funds. Agency expenses so paid out of the "permanent fund" include:

Indian agency buildings and repairs .....	\$ 10,869.61
Miscellaneous agency expense .....	44,453.16
Miscellaneous agency employees .....	358,383.63
Pay of agency mechanics .....	86,975.66
Pay of Indian police .....	342.40
<hr/>	
Total agency expense .....	\$501,024.40

Such expenses are not within the "civilization and self-support" provision.

In this connection, attention is invited to a decision of the Comptroller of the Treasury appearing in Volume XIX, Decisions of Comptroller of the Treasury (1912-13), pages 39-40. The Act of June 21, 1906 (34 Stat. 325), provided that the proceeds of the sale of Coeur d'Alene Indian lands should be deposited in Treasury "to be expended for their benefit under the discretion of the Secretary of the Interior *in the education and improvement of said Indians; and in the purchase of cattle, horses, harness, wagons, mowing machines and other agricultural implements for issue to said Indians, and also for the purchase of materials for the construction of houses and other necessary buildings, and a reasonable sum may also be expended by the Secretary in his discretion for the comfort, benefit and improvement of said Indians.*" The Comptroller was asked whether these funds could be expended (1) for agency buildings and (2) for administration expenses. The Comptroller held:

"These items would tend to show that the benefit contemplated by the foregoing Act is the *exclusive and direct* benefit of the Indians as distinguished from the *more remote and general* benefit resulting to them from the establishment and maintenance of an agency and the administration thereof.

"These moneys *belong to the Indians* and are not to be charged with expenses of administration, and that portion of the Act which provides 'for the purchase of material for the erection of houses or other necessary buildings' has reference to houses or other necessary buildings for the Indians, and not buildings for Agency administrative purposes."

If such agency administrative expenses are not payable under authority to expend Indian funds for the "education and improvement" and for the "comfort, benefit and improvement" of the Indians, certainly they are not so payable under an authority to appropriate for "civilization and self-support," particularly where that provision had been represented to the Indians as one to be called upon "in case of failure of crops or other unforeseen misfortune" (address of Commissioner to Indians, *supra*).

In determining for what purposes expenditures might be made under this provision, every doubt should be resolved in favor of the Indians. See Volume XXI, Decisions of the Comptroller of the Treasury, 1914-1915, page 393, where the applicable rule is stated as follows:

"No law should be construed as authorizing an expenditure from an Indian trust fund if it will reasonably admit of any other construction. Any doubt as to whether such an expenditure is authorized should be resolved in favor of the fund and against the expenditure."

These expenditures described in Finding 17 further include \$439,000 expended from the principal fund for "education"; \$140,000 more for "payments to the Minnesota public school system for tuition for Chippewa children," and \$43,000 paid therefrom to the Minnesota public school sys-



tem for purchasing school grounds and erecting school buildings constituting part of the public school system, and the property of the state. All this in spite of (1) the clear direction of the Act that a system of free schools among the Indians was to be established out of the *interest fund*, and (2) the provisions of the Constitution of Minnesota making it mandatory for the legislature to establish and maintain "a thorough and efficient system of public schools in each township of the state" (Secs. 1, 2, 3, Art. VIII, Constitution of Minnesota), and of the statutes of that state, making all public schools free to all persons of school age, and making attendance mandatory between the ages of 8 and 16.

On this state of facts, appellants contend that these apparent "donations" from plaintiffs' funds to this system of public schools were unauthorized and unlawful.

Attention is further particularly invited to the following items, whose connection with the promotion of civilization and self-support seems, to say the least, remote:

Burial of Indians .....	\$ 2,268.72
Annual celebration at White Earth .....	8,381.10
Payment to former chiefs of the Mille Lac Band .....	11,000.00
<hr/> Total .....	<hr/> \$21,649.82

Attention is further invited to the following item: "For the purchase of lands for allotment to individual Indians, \$40,017.31." Under the Act of 1889, all Indians entitled to allotments were to be allotted either out of the ceded lands on the reservation where they lived, or on the White Earth Reservation where ample lands were reserved for that purpose. It is submitted that the expenditure of the principal fund for this purpose was unauthorized.

F. "*Expenses, Care and Sale of Timber.*"

In addition to the reimbursements and expenditures above referred to, defendant expended \$547,421.25 directly from the permanent fund. This money was expended without any appropriation by or authority from Congress except such as was contained in the Act of 1889 itself (Finding 16, R. 50). This expenditure must, therefore, be justified, if at all, solely under the provisions of that Act. This expenditure forms part of the sum of \$669,606.34 shown as expended from the fund in the tabulation appearing in Finding 19 (R. 53).

The major item making up this sum is "Expenses, care and sale of timber, \$531,484.43."

Under the Act of 1889 the pine lands, together with the timber thereon, were to be sold at public auction by the General Land Office (Act of Jan. 14, 1889, Sec. 5, R. 39). There would have been little expense connected with this transaction, confined principally to the cost of the prescribed publication of notices of the sales. The agricultural lands were to have been disposed of to homesteaders (Sec. 6, R. 40). Nothing in the Act authorizes the separate sale of timber as such, or the expenditure of Indian funds in connection with its care or sale. The only expenses authorized by the Act to be "deducted" from the proceeds of the lands (Sec. 7, *supra*, R. 40) are those of obtaining the cessions, making the census of the bands, effecting the removals and allotments, and making the surveys and appraisals. The obvious intent was that the *disposal* of the lands (including the timber thereon) was to have been carried out by the Land Office through its regular staff at no material expense to the defendant and no charge to the trust fund.

For this reason it is submitted that the item of \$531,484.43

deducted from the fund for "care and sale of timber" cannot be justified under the provisions of the Act of 1889, and stands as an unauthorized and "unlawful" disposal of trust funds for which recovery is authorized by the terms of the Jurisdictional Act.

G. *Per Capita Payments of Principal.*

The facts with regard to this claim appear in Findings 21, 22 and 23 (R. 54-56). Pursuant to the Acts of Congress described in Finding 21 and set out in full in the appendix to the court's opinion (R. 77), the United States, as trustee, took from the principal fund and distributed in per capita cash payments the sum of \$5,684,341.50. The first, and largest, single distribution was made in the year 1917, pursuant to the Act of May 18, 1916 (39 Stat. 123, 135). During that year substantially one-fourth of the principal fund was distributed pursuant to that Act—the total distribution during 1917 being \$1,490,668.40. The material portion of the Act of May 18, 1916, under which this distribution was made, reads as follows:

"That the Secretary of the Interior, under such rules and regulations as he may prescribe, is hereby authorized to advance to any individual Chippewa Indian in the State of Minnesota entitled to participate in the permanent fund of the Chippewa Indians of Minnesota one-fourth of the amount which would now be coming to said Indian under a pro rata distribution of said permanent fund: *Provided*, That the Secretary of the Interior, under such rules and regulations as he may prescribe, may use for or advance to any Chippewa Indian in the State of Minnesota entitled to share in said fund who is incompetent, blind, crippled, decrepit,

or helpless from old age, disease, or accident, one-fourth of the amount which would now be coming to said Indian under a pro rata distribution of said permanent fund: *Provided further*, That any money received hereunder by any member of said tribe or used for his or her benefit shall be deducted from the share of said member in the permanent fund of the said Chippewa Indians in Minnesota to which he or she would be entitled: *Provided further*, That the funds hereunder to be paid to Indians shall not be subject to any lien or claim of attorneys or other third parties."

Of the other per capita payment acts the first two authorized distributions of \$100 per capita, and the last two authorized distributions of \$50 per capita, resulting in distributions from principal of \$1,270,666.39 in 1922; \$1,353,096.66 in 1924; \$774,761.91 in 1925 and \$767,898.11 in 1926 (Finding 21, R. 54).

In connection with each distribution the Secretary of the Interior required each distributee to sign a release reading as follows (Finding 23, R. 55):

"In consideration of the payment represented by check No. ...., dated ..... , I hereby release and quitclaim unto the United States forever all my right, title, and interest in and to that portion of the principal fund of the Chippewa Indians of Minnesota arising under the act of January 14, 1889, which has been or shall be distributed per capita to said Indians under the Act of ....., to the extent of \$....."

Apparently this was a general policy adopted in connection with all these per capita payments. There was no occasion for taking such a release if this diversion of plaintiffs

funds was one lawful under the plenary power of Congress. If, however, it was thought possible that the plenary power of Congress did not extend to such a diversion of these funds, then as to all payees who survived so as to become entitled to a share in the ultimate distribution, the government would then be in a position to recoup itself under the terms of these releases. The effect of these releases and the relief properly awardable under this claim is further discussed in the next section of this brief.

In the ten years intervening between the first per capita payment (in 1917) and June 30, 1927 (the last date covered by the report of the General Accounting Office, upon which the findings are based—see last sentence of Finding 15 (R. 50), the recipients of more than one-seventh of the entire 1917 distribution had died, and the mortality among the recipients of the later distributions was such that during the ten-year period, persons who had received a total of more than \$415,000 out of the several per capita payments were dead (Finding 22, R. 55). This computation covers only the first ten years after the first per capita distribution. Because of the increasing age of the original beneficiaries, a very much larger percentage of deaths must have occurred during the twelve years since 1927.

The amounts thus disbursed to individuals who have since died is not the basis of plaintiffs' present claims in this regard, but these facts are cited solely to emphasize the impropriety of these distributions from the "permanent fund" created under the Act of January 14, 1889.

*In making these distributions the trustee deliberately made a distribution of principal or corpus to persons who, at the date of the distributions, were entitled to share in income only, and of whom only those who survive to the*

date of final distribution will ever be entitled to any share in principal.

By these distributions of corpus, not only the amount ultimately distributable, but the interest payable by the defendant, was reduced.

The interest which would have accrued on the amounts shown to have been distributed in per capita payments (Finding 21, R. 54) from June 30th of the years in which each distribution was made, to June 30, 1939, at the prescribed rate of 5% per annum, aggregates \$4,800,253.79, or more than 85% of the amount of such principal distributions. This amount would have been currently distributable by defendant to the income beneficiaries had these principal distributions been retained in the fund.

These per capita distributions in the aggregate amount of \$5,684,341.50 were withdrawn from a principal fund which in 1927, the year after the last distribution, stood at only \$4,855,308.09 (see tabulation included in Finding 15, R. 50). In other words, the defendant, as of that date, *had distributed more in per capita cash payments to the class entitled only to income, than remained for distribution to the class entitled to receive the permanent fund on final distribution.* In addition it will be of interest to note that as a further result of defendant's policies in dealing with this fund, *the entire balance remaining in the so-called "permanent fund" on December 31, 1937, was only \$452,496.* (Hearing Before Sub-Committee of Committee on Appropriations, House of Representatives, 75th Cong. 3rd Session, on Int. Dept. Appropriation Bill for 1939, Part II, p. 18.) At page 569 of the cited document the following appears:

"Only a few years ago the balance in the Chippewa in Minnesota fund was in excess of \$8,000,000, and through special acts of Congress about \$3,000,000 was



added thereto. The balance in the fund is now about \$500,000. While much of the fund has been distributed to the Indians per capita, a large part thereof has been used for agency administration, hospital support, educational, and other expenditures."

In other words, \$5,684,341.50 out of this principal fund has been distributed in cash to beneficiaries entitled only to income, a "large part of the fund has been used for agency administration," and, with the trust period not yet closed, there remains for distribution to the remaindermen only about \$450,000. This is the "permanent fund" which was to be depleted only for (1) the expenses of carrying out the Act of 1889, (2) reimbursement for advance interest, and (3) to the extent of not more than 5% thereof for "promoting civilization and self-support."

No one contends that these per capita cash distributions were authorized by the provisions of the Act of January 14, 1889. They are not claimed to constitute expenses incurred in carrying out that Act. They were not appropriated by Congress "for the purpose of promoting civilization and self-support." In its brief below defendant as to this claim said:

"For the reasons hereinbefore stated, defendant earnestly contends that the principal fund, under the correct interpretation of the act of January 14, 1889, was tribal property of the Chippewa Indians of Minnesota tribe and subject to the plenary power of Congress, and that *per capita payments* from that fund to these Indians were lawful exertions of that power."

These per capita payments were justified by the Court of Claims solely on the ground that they constituted a lawful

exercise of the plenary power of Congress. Thus the Court of Claims says (R. 73) :

"The Secretary of the Interior did, in accord with the acts of Congress attached hereto, make per capita distributions from the funds of the Indians in the Treasury to the amount of \$5,684,341.50 and manifestly this decreased to this extent the amount of the fund available for distribution at the end of the fifty-year period. Hence the issue presented by the requested findings is identical with plaintiffs' contentions as to all claims preferred. \* \* \*

"The final result, so far as the distributees mentioned in the Act of 1889 are concerned, is in no way obscure. That, however, is not the issue. If Congress determined to utilize the existing fund for a generation of tribal Indians who in their judgment needed it to ward off the hardships of life, and who were really the creators of the fund, it was a matter for Congress to determine and not the courts."

For reasons which we have attempted to set forth in the preceding section of this brief, it is submitted that the so-called "permanent fund," and the rights of the ultimate distributees therein, were not subject to the plenary control of Congress, and that these disbursements cannot be justified thereunder.

## IV.

**The Remedy Sought.**

Each claim asserted is based upon a disposition by the United States as trustee of portions of the principal or "permanent" fund—the corpus of the trust—for a purpose unauthorized by the agreements entered into under the Act of January 14, 1889—in other words, for a disposition of this fund *in a manner to which the necessary assent of the Indians was not given.*

The claims are asserted in behalf of the class which necessarily bears the brunt of the loss in connection with any diminution of principal, *i. e.*, the ultimate remaindermen, those entitled to share in the distribution of corpus upon the termination of the trust.

The Special Jurisdictional Act (44 Stat. 555; 45 Stat. 423; 48 Stat. 979; R. 33) expressly authorizes such a suit in the name of these appellants, who may prosecute "all legal or equitable claims arising or growing out of the Act of January 14, 1889," and, under the amendment to Section 1 of that Act, are to be considered as "representing all those entitled to share in the final distribution of the permanent fund." If this were not clear enough, the committee of Congress reporting this amendment for passage stated (*supra*):

"The sole object of the (amendatory) bill is to *make certain that the claims of the remaindermen*, that is the class described in the agreements as 'said Chippewa Indians and their issue' are before the court for determination. \* \* \* The bill should be adopted so that there may be no doubt that all claims 'arising or growing out of the Act of January 14, 1889,' which the Chippewa Indians of Minnesota, *or any class thereof,*

have, may, in the pending suits, be finally adjudicated and closed."

The claims, in each instance, seek a judgment based upon the entire amount unlawfully disposed of by the trustee.

This, too, is in strict accord with the Special Jurisdictional Act which provides (Sec. 4; R. 34) that if it be found "that the United States, in violation of the terms and provisions of any law, treaty or agreement \* \* \* has unlawfully appropriated or disposed of any money or other property, damages therefor shall be confined to the value of the money or property at the time of such appropriation or disposal," plus interest.

Appellants further claim that the proceeds of any recovery for these breaches of trust should replace the misappropriated principal funds in the Treasury of the United States, there to draw interest as originally provided. This is provided for by Section 10 of the Jurisdictional Act (R. 5).

In other words, Congress has expressly directed:

(1) That the trustee, the United States, may be sued in the Court of Claims, in the name of these appellants.

(2) That the claims of "any class" of beneficiaries of the trust, and particularly the claims of the "remaindermen" shall be "finally adjudicated and closed."

(3) That if any unlawful disposition of the trust fund is shown, damages for the amount so disposed of may be had.

(4) That the amount of any such recovery be restored to the trust.

In thus providing for the return by the trustee to the trust principal of amounts unlawfully diverted therefrom Congress did not create any new rights, but merely consented that the United States be sued to enforce liabilities

to which it would have been subject as trustee, save for its sovereign immunity.

We have seen that even without statutory authorization a representative suit may be maintained in equity to vindicate the rights of a shifting and uncertain class of ultimate remaindermen whose rights are imperiled by unlawful dispositions of principal by the trustee (*Restatement of Law of Trusts*—Am. Law Institute, Sec. 214, Comment (a), quoted *supra*).

That remaindermen or ultimate distributees of a trust have an immediate and continuing right at all times during the life of the trust to have the corpus of the trust preserved, unimpaired by waste or unlawful or negligent disposal, is, we believe, elementary and needs no extensive citation of authorities.

*Bogert* on "*Trusts and Trustees*," Vol. 7, Sec. 814, summarizes the ordinary rules here involved as follows (italics added) :

"If the trustee pays income to a remainderman *cestui*, or capital to a life tenant, when such payments are wrongful, he is liable to the injured party for the damage caused. *The trustee must replace in the trust fund overpayments made to any cestui.* He has his own cause of action to recover the excess from the *cestui* to whom overpayment was made, and may withhold the amount of the overpayment from sums which later accrue as due the one overpaid."

The authorities cited by *Bogert* establish the right of the remainder interest to enforce the duty to restore the trust prior to its termination. Thus in the case of *Sedgwick's Curator vs. Taylor*, 84 Va. 420, 6 S. E. 226, where a trustee had expended corpus for the benefit of the life tenant, the

trustee was held liable, at the suit of a contingent remainderman, for the amount of corpus so diverted, although the life estate had not yet terminated. The court said:

"The life tenant is still living, and the interests in remainder under the trust deed being contingent, the right to demand payment of the principal fund has not yet attached. It was competent, however, for appellee (one of the remaindermen) to maintain a suit to have the fund collected and his interest protected."

The right of a remainderman to sue for an accounting during the life of the trust was also clearly recognized in *Franz vs. Buder* (C. C. A, 8th), 11 Fed. (2d) 854.

In *Williams vs. Sage*, 167 N. Y. S. 179, at 183, the court says:

"A person taking a contingent remainder or gift over after a defeasible estate has, equally with the owner of the vested estate, the right to enforce due execution of the trust."

In *Pritchard vs. Williams*, 175 N. C. 319, at 322, the court says:

"The plaintiffs as remaindermen, could have maintained an action to have the trust declared during the existence of the life interest, as without this right it would have been in the power of the trustee to defeat the trust."

In such cases the return to the trust of any money or property wrongfully disposed of by the trustee, with interest reaches "as nearly as possible what justice demands." *McComb vs. Frink*, 149 U. S. 629, at 644.

This is, of course, true, since the restoration of the trust



to its proper figure restores both annual income and corpus to the amount to which each class of beneficiaries is entitled.

The court below was impressed with the fact that if recovery were granted some individuals who had received the benefit of portions of the original trust fund (for example the per capita payees) and who survived the trust period, might be paid twice. Thus the court says (R. 65) :

"If the plaintiffs are to recover for the designated 'remaindermen' they will have received not only the benefits of the so-called trust fund during all these years but the Government will be required to duplicate the distribution to their heirs at the end of the fifty-year period."

The answer to this objection is to be found in the ordinary rules above cited, applicable to all trustees. If the wrongful disposition of trust principal consists of excessive or unauthorized payments to one who still remains a beneficiary of the trust, and, as such, is entitled to share in later distributions of principal or income, *this does not change or diminish the liability of the trustee to remaining cestuis to restore to the trust the principal amounts diverted.* The trustee's recourse against a duplication of payments in such a case is succinctly stated by Bogert (*supra*) (italics added) :

"The trustee must replace in the trust fund overpayments made to any cestui. He has his own cause of action to recover the excess from the cestui to whom overpayment was made, and may withhold the amount of the overpayment from sums which later accrue to the one overpaid."

As to such items as per capita cash payments to individuals who survive the trust, the adequacy of defendant's

rights in this regard are clear. Not only will defendant have the benefit of the general right of recoupment above stated, but as pointed out above, it holds a release executed by each per capita distributee releasing forever all the right, title and interest of the distributee in "that portion of the principal fund arising under the Act of January 14, 1889, which has been or shall be distributed per capita, to the extent of \$ . . . ." (Finding 23, R. 55). These instruments, demanded and secured by defendant from each per capita distributee, furnish definite evidence of the then intent of defendant to deduct the amount distributed from any shares of corpus which ultimately accrue to any such recipient of per capita payments. Such releases serve no other purpose, and evidence a clear realization by the disbursing officers of the exact situation.

The Court of Claims recognizes the soundness of this position if it be held that recovery should be had, saying (R. 75):

"Plaintiffs argue that notwithstanding per capita payments made to individual Indians who had died prior to June 30, 1927, and to others now living who may survive the trust period, the entire amount distributed under the special acts should be appropriated by Congress and restored to the so-called trust fund. As to the survivors, the defendant is fully protected by receipts, and as to decedents the payment was unauthorized.

"If the judgment of the court is erroneous and plaintiffs' contention hereafter sustained, the above argument will become important; it is now a stated principle of accounting, and may become important in fixing the sum to be appropriated if this court is wrong in its adjudication of the case."

As to those recipients of per capita or other improper distributions who do not survive to participate in the final distribution of the trust, recoupment from distributable shares of corpus will not be available, and any right of recoupment will be confined to interest payments accruing prior to death. As to such payments out of principal defendant is simply in the position of a trustee who has deliberately paid out principal to one not then, or ever, entitled thereto. As to such payments, as *Bogert* says (*supra*), the trustee must replace in the trust fund the overpayment, and thereupon "has his own cause of action to recover the excess from the *cestui* to whom overpayment was made." If by reason of the insolvency of any beneficiary of defendant's breach of trust or for any other reason its cause of action for recoupment is of little value this does not on any theory mitigate the plain duty owed to all classes of beneficiaries to restore the trust corpus.

As to items such as defendant's withdrawals for its own use of amounts taken as reimbursement for unauthorized expenditures, the payment of the cost of maintaining defendant's Indian service, and similar matters, we have plain diversions of trust funds for the trustee's own benefit, as to which, if unauthorized, the duty to restore is plain.

A total of more than \$17,600,000 was paid into the trust fund. That fund was designated in the Act of 1889, and the agreements of cession as a "permanent fund." It was clearly intended by both parties that save for certain limited disbursements for specific purposes, the principal fund thus established should remain intact during the fifty year trust period, for distribution in equal shares to the members of the former bands, if any, then surviving, "and their issue then living." The Indians believed and intended that they had preserved this trust estate for "posterity."

Although the assent of the Indians was necessary to the proposed disposition of their lands and the proceeds and although the terms of that assent carefully limited the disposal of the permanent fund to the specific purposes set forth in Section 7 of the Act of 1889, defendant has disbursed the fund for other purposes, in admitted and plain violation of terms of the trust. Today less than \$500,000 remains for the ultimate beneficiaries. The only justification pleaded for the major part of these unauthorized disposals is that they were made under plenary power of Congress, a power in fact inapplicable here.

These disposals were unlawful and in violation of the agreements which defined the trust, and under both the plain language of the Special Jurisdictional Act and the ordinary rules as to the duties and liabilities of trustees, judgment for the restoration of the diverted funds is called for.

For the foregoing reasons it is submitted that the judgment of dismissal appealed from should be reversed.

HOLMES, MAYALL, REAVILL & NEIMEYER,

*Duluth, Minnesota,*

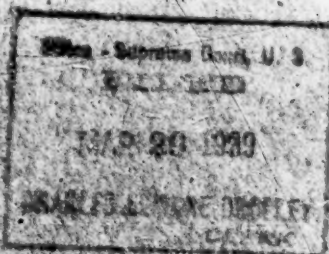
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**FILE COPY**



**No. 666**

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**In the Supreme Court of the United States**

**OCTOBER TERM, 1938**

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**THE UNITED STATES**

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**BRIEF FOR THE UNITED STATES**

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# **In the Supreme Court of the United States**

**OCTOBER TERM, 1938**

---

**No. 666**

**THE CHIPPEWA INDIANS OF MINNESOTA, APPELLANTS**

**v.**

**THE UNITED STATES**

---

**ON APPEAL FROM THE COURT OF CLAIMS**

---

**BRIEF FOR THE UNITED STATES**

**OPINIONS BELOW**

The opinion and supplemental opinion of the Court of Claims (R. 56-76) are not yet reported.

## **JURISDICTION**

The judgment from which this appeal is taken was entered November 14, 1938 (R. 33). On January 9, 1939, the court below denied motions for a new trial filed by both parties and allowed in part their requests for amendments to the special findings of fact (R. 76). This appeal was allowed on January 24, 1939 (R. 83). Probable jurisdiction was noted March 6, 1939. Appellants invoked the



jurisdiction of this Court under the special jurisdictional Act of June 22, 1936, c. 714, 49 Stat. 1826.

#### QUESTIONS PRESENTED

1. Whether the power of Congress to administer the tribal property of Indians in any way it deems to be in the interest of the Indians was terminated by the Act of January 14, 1889, c. 24, 25 Stat. 642, and agreements thereunder, as regards the trust fund established pursuant to Section 7 of that Act, so that thereafter Congress, in administering the fund, was restricted to a strict compliance with the provisions of Section 7.

2. Whether, assuming that the plenary power of Congress was so extinguished as to the fund established under Section 7, various disbursements which the United States has made from the fund violated that section, and whether, assuming that they did, the damages for such violations are presently ascertainable.

#### STATUTES INVOLVED

The full text of the Act of January 14, 1889, c. 24, 25 Stat. 642, and the pertinent provisions of the special jurisdictional Act of May 14, 1926, c. 300, 44 Stat. 555, as amended by the Acts approved April 11, 1928, c. 357, 45 Stat. 423, and June 18, 1934, c. 568, 48 Stat. 979, are set out in the special findings of the court below (R. 33-42).

## STATEMENT

This suit was brought by the Chippewa Indians of Minnesota pursuant to a special jurisdictional act to compel the United States as trustee of a fund established by the Act of January 14, 1889, c. 24, 25 Stat. 642, to restore to the principal of the fund certain sums paid out of the fund by the United States for the benefit of the Indians.

The Court of Claims dismissed the petition (R. 79). It held that after the Act of 1889 the Chippewa Indians of Minnesota, who had theretofore comprised a number of bands of tribal Indians, became a single tribal organization having communal lands and funds (R. 59-60, 64); that the Act, and its approval by the Indians, did not vest property rights in individual Indians (R. 61) nor abrogate the plenary power of Congress over Indian tribal property (R. 72, 76); and that since the disbursements from the fund were authorized by the Act of 1889 or subsequent acts of Congress and were used for the benefit of the Indians without profit to the United States (R. 59, 71-72) the Indians were not entitled to recover. The Indians have appealed.

The Act of January 14, 1889, proposed to the Minnesota Chippewas a plan for ceding to the United States all their lands except those required and reserved to fill allotments. Agreements of cession were thereafter concluded with the various Chippewa bands, and were approved by the President on March 4, 1890 (R. 42, 43).

Section 7 of the Act provides: The money realized from the sale of the ceded lands, after deducting certain expenses, shall "be placed in the Treasury of the United States to the credit of all the Chippewa Indians in the State of Minnesota as a permanent fund," and shall draw 5 per cent interest. For a period of 50 years after the allotments provided for in the Act have been made three-fourths of the interest shall be paid to the Indians annually, and the balance devoted to education, and upon the termination of the trust period the fund shall "be divided and paid to all of said Chippewa Indians and their issue then living, in cash, in equal shares." Congress may from time to time during the trust period make appropriations not exceeding 5 per cent of the principal of the fund for purposes of civilization and self-support among the Indians. The United States undertakes to advance interest in the sum of \$90,000 annually, less any interest accruing on the fund, until the fund shall equal or exceed \$3,000,000, at which time the United States shall be reimbursed out of the excess for all advances of interest and other expenses under the Act.

The appellants contend that this section created a vested right in the principal of the fund in those Chippewas and their issue who would be alive at the time of distribution, and that every disbursement from principal not specifically authorized by Section 7 was a violation of the rights of these dis-

tributees Suing on behalf of these distributees, they ask that all such disbursements be restored to the principal of the fund. The particular acts of the United States, as trustee, upon which appellants base their claim to recover may be summarized as follows:

1. By Section 8 of the Act of 1889 and annually in each of the years 1891 to 1910, both inclusive, Congress appropriated \$90,000 as advance interest. Expenditures from these appropriations totalled \$1,869,929.39, of which \$896,246.93 was reimbursed to the United States from the principal fund and the balance from the interest fund (Findings 7 and 8, R. 43-45). The appellants, asserting the maximum reimbursable out of principal to be the amount which would have been advanced had appropriations ceased when the fund commenced to earn \$90,000 annually less such amounts as had then accrued as interest on the fund, claim that the reimbursement of \$896,246.93 exceeds by \$232,010.91 the amount authorized by the Act (Br. 78-81).

2. Between 1890 and 1910 Congress appropriated out of public funds a total of \$2,350,559 for the relief and civilization of the Indians and directed that these expenditures be reimbursed out of the proceeds of sale of the ceded lands. It is not shown to what extent any of these appropriations exceeded 5% of the principal of the fund. Of the \$2,338,625.32 expended under these appropriations

and subsequently reimbursed, \$328,163.95 was manifestly authorized by the Act of 1889 and is not in dispute (Finding 9, 10, R. 45-47). Appellants claim that the expenditure of the balance of \$2,010,461.37, and of additional sums totalling \$107,445.71, disbursed for school buildings and for drainage surveys pursuant to appropriations by Congress and reimbursed from the principal fund (Findings 11, 12, and 14, R. 47-49),<sup>1</sup> was unauthorized by the Act (R. 31; Br. 81-88).

3. From 1911 to 1926, inclusive, Congress appropriated directly from the principal fund sums aggregating \$2,754,500 for promoting civilization and self-support among the Indians. No one of these appropriations exceeded 5 per cent of the amount then constituting the fund. Pursuant to these appropriations, \$2,526,267.74 was expended for the benefit of the Indians (Finding 15, R. 49, 50). Appellants claim that the Act of 1889 permits the appropriation, for civilization and self-support, of a maximum of 5 per cent of the total sum paid into the principal fund after admittedly authorized deductions had been made. They variously estimate this 5 per cent at \$800,000 and \$883,116.29, and assert that the excess disbursed for these purposes was in violation of the Act (Br. 89-93).

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<sup>1</sup> Assignment X (Br. 21) relates to these additional disbursements but the point is not argued.

4. Between June 30, 1904, and June 30, 1927, the sum of \$547,421.25 was paid out of the principal fund without any specific appropriation by Congress, but under authority of the Act of 1889, to defray certain expenses, including expenses incurred in connection with councils and delegations, the allotment of reserved land, and the sale of ceded land and timber (Finding 16, R. 50, 51). These expenditures, and particularly such as relate to the care and sale of timber, are claimed to violate the Act (Br. 97-98).

5. In accordance with acts of Congress ratified by the Indians sums aggregating \$5,684,341.50 were paid out of the principal fund in per capita cash payments from 1916 to 1927, inclusive. The individual recipients of these payments each released his interest *pro tanto* in the principal fund (Findings 21-23; R. 54-56). Appellants claim that the entire amount distributed should be restored to the fund (Br. 98-103).

6. Appellants further demand interest from the date of disbursement on each of the foregoing amounts (R. 30-32).<sup>2</sup>

The special jurisdictional act permits the United States to offset claims against the Indians or gratuities conferred on them. From January 14, 1889, to June 30, 1934, the United States expended for

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<sup>2</sup> Claims numbered 10 and 11 in the prayer for relief of appellants' second amended petition (R. 30-32) were not pressed in the Court of Claims and have been abandoned. Claims numbered 2, 4, and 5 therein are not urged in appellants' brief and appear to have been dropped.



the use and benefit of the Indians a total of \$5,065,878.95 for which it has received no reimbursement (Finding 20; R. 54).

#### SUMMARY OF ARGUMENT

.The court below correctly dismissed the petition.

All payments out of appellants' fund were made pursuant to the Act of January<sup>14</sup>, 1889, or subsequent acts of Congress, and since they were expended exclusively for the benefit of the Indians they were within the plenary power of Congress over the property of tribal Indians. Appellants' contention that the consent of the Chippewa bands was necessary to give legal validity to the Act of 1889 is unsound, but even if true such consent was required only to merge the properties of the bands into one tribal property in which the enrolled members of all bands would share equally. All other features of the plan contemplated by the Act, including the sale of lands to provide a fund could have been put into effect without the Indians' consent. Even if such consent was necessary as to one particular feature of the plan, that did not deprive Congress of plenary power thereafter to administer the other features of the plan, nor warrant the inference that Congress intended to enter into a contract with Indians depriving it of that power, if, indeed, Congress could barter it away. The Act of 1889 presents no exception to the rule that treaties

or agreements with the Indians, even though containing provisions which Congress was powerless to impose without the Indians' approval, are not to be construed as contracts vesting rights in individuals, but as public laws subject to such changes as Congress in the exercise of its plenary power may consider desirable. Neither the tribal status of the Indians or their property nor the power of Congress as guardian terminates until Congress expressly so directs. The Act of 1889 and subsequent acts of Congress affecting the Minnesota Chippewas plainly treat the funds as tribal.

Even if Congress were required to administer the trust fund strictly in accordance with the Act of 1889, there can be no recovery on the present record because (1) there is no proof that reimbursement for advance interest was not correctly allocated between the principal and interest funds, (2) it is not shown to what extent any of the appropriations from public funds for the relief and civilization of the Indians, exceed the 5 per cent of the fund which Congress was authorized to appropriate from time to time, (3) none of the appropriations from the Chippewa fund for civilization and self-support exceeded 5 per cent of the fund, and (4) any damage suffered because of per capita cash payments of principal by persons born since the making of those payments (who alone might have standing to complain) cannot be ascertained

on the present record or until the time for final distribution.

## ARGUMENT

### I

THE ACT OF 1889 DID NOT, AS REGARDS THE FUND ESTABLISHED PURSUANT TO SECTION 7 OF THAT ACT, TERMINATE THE PLENARY POWER OF CONGRESS TO ADMINISTER INDIAN TRIBAL PROPERTY. THE ACTS COMPLAINED OF WERE WITHIN THAT POWER

At the beginning of the nineteenth century the Chippewas were one of the larger Indian tribes in the Northern United States. First dealt with as a single tribe, they later came to be regarded as divided into bands, each entitled to hold its lands independently of the others and of the Chippewas as a whole. *Chippewa Indians v. United States*, 301 U. S. 358, 360, 361. At the time the Act of 1889 was passed the Minnesota Chippewas, who were considered collectively as a single tribe, comprised numerous bands occupying distinct reservations. They were tribal Indians and held their reservations as tribal lands. *Wilbur v. United States, ex rel. Kadrie*, 281 U. S. 206, 208.

It is well established and appellants, of course, do not deny that Congress has full power in the administration of the tribal property of Indians to use such property for any purpose it deems to be for the good of the tribe. *Cherokee Nation v. Hitchcock*, 187 U. S. 294; *Lone Wolf v. Hitchcock*, 187

U. S. 553; *Winton v. Amos*, 255 U. S. 373. The only limitation upon the power of Congress over the tribal property is that it cannot confiscate it or devote it to purposes admittedly not for the benefit of the tribe. *United States v. Mille Lac Chippewas*, 229 U. S. 498; *Lane v. Pueblo of Santa Rosa*, 249 U. S. 110; *United States v. Creek Nation*, 295 U. S. 103.

Unless the Act of 1889 was intended to and did create individual rights in what had admittedly been tribal property, the appellants can in no event recover, for, as will be shown *infra*, pp. 28-34, each of the payments complained of was authorized by act of Congress and was made directly to or applied for the benefit of the Chippewa Indians of Minnesota without profit to the United States. *Thus the crucial question presented is: What, if any, change was wrought by the Act of 1889 and the agreements of cession upon the legal status of these Indians and their property?*

Appellants contend that when the act became effective on March 4, 1890, the tribal relation was abolished and two separate classes of individual Indians, composed respectively of income beneficiaries and remaindermen, resulted, each with vested interests in the trust fund, it being appellants' theory that the consent of each band was required to merge their properties into one fund in which all the Indians shared equally, and that Con-

gress to secure this consent, abandoned its sovereign power of guardianship and entered into a binding contract, which limited its authority to that of an ordinary trustee of an express trust.

It is the position of the Government that all provisions of the Act of 1889, including those relating to the sale of the lands of the numerous bands to produce a fund for the equal benefit of all the Chippewa Indians in Minnesota, could have been imposed without the consent of the Indians; that, even if consent was necessary to effect a merger of the properties of the bands, its necessity solely for that purpose would not limit, as to other provisions of the Act, the plenary power of Congress over tribal Indians and their property; that the fact that Congress chose to obtain the consent of the Indians is no indication that a contract was made or that the plenary power was abandoned; that the Act of 1889 itself and subsequent acts of Congress show a consistent intention to treat the Chippewas in Minnesota as a tribe and their funds as tribal funds subject to being administered by Congress in the exercise of the plenary power; that the Act of 1889 was at most a declaration of present intention as to the management of the fund, subject to alteration at any time that changed conditions or the welfare of the Indians required it, so long as the tribal status continued or until rights vested in possession in individuals through the carrying of the Act into effect; and that charges made by the

appellants that the trust was improvidently administered are not supported by the facts.

A. THE ACT OF 1889 AND THE AGREEMENTS OF CESSION DID NOT CREATE VESTED RIGHTS TO HAVE THE FUND ADMINISTERED STRICTLY ACCORDING TO THE TERMS OF SECTION 7 OF THAT ACT

It is established that no treaty with the Indians or act of Congress regulating their affairs, whether or not submitted to them for their approval or consent, creates a contract or vests rights so as to disable Congress from later making such changes as conditions require, so long as tribal relations continue and no individual rights have attached by the carrying of the legislation into effect.<sup>3</sup> Appellants seek to distinguish the present case on the ground that the consent of the Indians to the provisions of the Act of 1889 not only was obtained but had to be obtained and that therefore the United States, in order to induce the Indians' approval cast off its sovereign powers and, on equal terms, entered into negotiations which resulted in a contract irrevocably binding on both the United States and the Indians.

<sup>3</sup> *Chase, Jr. v. United States*, 256 U. S. 1, 7 (Treaty); *United States v. Chase*, 245 U. S. 89 (Treaty); *Sizemore v. Brady*, 235 U. S. 441, 449-450 (Original Creek Agreement); *Gritts v. Fisher*, 224 U. S. 640, 648 (Cherokee Agreement); *Choate v. Trapp*, 224 U. S. 665, 670-671 (Atoka Agreement); *Lone Wolf v. Hitchcock*, 187 U. S. 553, 565 (Treaty); *Thomas v. Gay*, 169 U. S. 264, 271 (Treaty); *The Cherokee Tobacco*, 11 Wall. 616 (Treaty). See also *Ex parte Webb*, 225 U. S. 663, 683; *Cherokee Intermarriage Cases*, 203 U. S. 76, 93; *Cherokee Nation v. Hitchcock*, 187 U. S. 294; *Stephens v. Cherokee Nation*, 174 U. S. 445, 488;



While it is true that the opinion of this Court in *Chippewa Indians v. United States*, 301 U. S. 358, 375-377, intimates, although it does not hold, that Congress could not constitutionally pool the properties of the various bands without first securing the assent of each of them, it is suggested that there is a substantial distinction between appropriating the property of one band or tribe for the use of another<sup>4</sup> and merging the properties of several bands, particularly when, as here, each had formerly been part of the great Chippewa tribe and at the time of the merger were all regarded collectively as the single tribe of Minnesota Chippewas. *Wilbur v. United States ex rel. Kadrie*, 281 U. S. 206, 208. In the former situation no conceivable benefit can accrue to the band whose property is taken; in the latter the loss by one band of its exclusive

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*Ward v. Race Horse*, 163 U. S. 504, 511; *Spalding v. Chandler*, 160 U. S. 394, 406-407; *Missouri, Kansas & Texas Ry. Co. v. Roberts*, 152 U. S. 114, 117.

Also see *Morrison v. Fall* (App. D. C. 1923), 290 Fed. 306, 309-311 (the Act of 1889 was not a contract and Congress in its discretion could change the method of handling Chippewa funds), aff'd on the ground the United States was a necessary party, *sub nom. Morrison v. Work*, 266 U. S. 481.

Regarding the power of Congress to administer the trust of Osage mineral rights see *Taylor v. Tayrien* (C. C. A. 10, 1931), 51 F. 2d 884, 887, 890, 891, cert. den. 284 U. S. 672; *Ne-Kah-Wah-She-Tun-Kah v. Fall* (App. D. C. 1923), 290 Fed. 303, dism. for want of jurisdiction 266 U. S. 595; *Globe Indemnity Co. v. Bruce* (C. C. A. 10, 1935), 81 F. 2d 143, 150, cert. den. 297 U. S. 716.

<sup>4</sup> *Lane v. Pueblo of Santa Rosa*, 249 U. S. 119, 113; *United States v. Creek Nation*, 295 U. S. 103, 109-110; *Shoshone Tribe v. United States*, 299 U. S. 476, 497.

right to the use and occupancy of its reservation is compensated by the joint interest its members receive in the property of all of the merged bands. Moreover, the administration of the combined properties as a single unit may well confer an additional general benefit. No reason is perceived for establishing a rule that the United States, by recognizing a band as an entity, should forever be barred from including that band and its property in administrative measures which it is empowered to adopt for the welfare of the tribe of which the band in question forms a part. It is submitted that the power to determine when to deal separately with a band and when to treat it as a part of the whole tribe is political and within the exclusive jurisdiction of Congress.<sup>5</sup>

But, even assuming the necessity of securing the bands' approval of the pooling of their properties,

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<sup>5</sup> We need not consider whether the properties of two or more separate tribes or of two or more bands not affiliated with the same tribe may be pooled without their consent, but where all bands concerned are related to the same tribe there is no reason why one should be deemed vested with a greater share of the tribal wealth than its proportionate population warrants. In this connection Commissioner Rice, after recalling to the Council of the Mille Lac Band that the Chippewas as a whole had driven out the Sioux from the lands they now occupied, said:

"Afterward you owned the country, and as you had taken it in common, it belonged to you in common. \* \* \* The Great Council, in looking over your history for a great many years back, came to the conclusion that the holding of the land should remain as at first, and that you should reap the benefit of your united efforts." H. Ex. Doc. 247, 51st Cong., 1st Sess., pp. 164, 165.

it does not follow that the United States lost the power to deal with the combined tribal assets that it previously had with respect to the same assets of the several bands. No inference can be drawn that Congress intended to enter into a contract with the Indians depriving it of that power, if, indeed Congress could barter it away. At most consent was required to effect the merger, for all other provisions of the Act of 1889, including the conversion of lands into trust funds, could have been enacted through the exercise of the plenary power. *United States v. Rowell*, 243 U. S. 464, 468; *Lone Wolf v. Hitchcock*, 187 U. S. 553, 568. If power were lacking in Congress to administer Indian funds and such power were conferred by agreement, there might be some grounds for argument that the terms of the agreement with respect to administration would bind Congress. But such is not the case. The power to administer the property existed. If any power was conferred by agreement, it was merely to administer the property as one fund for the benefit of all the Indians rather than as a number of separate funds each for the exclusive benefit of the members of one band. It is not contended that it has not been so administered. It is absurd to suppose that Congress, in order to secure the pooling of interests of Indian bands—a change designed to promote more advantageous administration of their property and to carry out its then policy of ultimately breaking up the tribal relation—should have bartered away its power as

guardian to protect them from such vicissitudes as might occur in the critical period of their emergence from a state of tutelage. *Conley v. Ballinger*, 216 U. S. 84, 90, 91.\*

Unless and until Congress unmistakably manifests an intention to emancipate tribal Indians and abandon its plenary power over them and their property, that power continues to exist.

It is not material that treaties or agreements may have been entered into embodying provisions which Congress could not have imposed without the consent of the Indians. The case of *Lone Wolf v. Hitchcock*, 187 U. S. 553, involved facts closely analogous to the present case. A treaty, 15 Stat. 581, concluded in 1867 with the Kiowa and Comanche tribes set apart a reservation for their use. By a separate treaty, 15 Stat. 589, concluded on the same day with these tribes and the Apache

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\* A change in character of Indian property over which the United States has control, even though made by contract which only the Indians have power to execute, does not of itself extinguish the power of the United States. *Sunderland v. United States*, 266 U. S. 226, 233-234; *Mott v. United States*, 283 U. S. 747, 750. These cases deal with individual property, over which the federal power is more limited, but the principle is the same because the restrictions against alienation which are placed upon allotments are merely a retention by Congress of certain attributes of the plenary power which it formerly exercised over the tribal property. *Heckman v. United States*, 224 U. S. 413, 436-437.

† *Winton v. Amos*, 255 U. S. 373, 391-392; *Brader v. James*, 246 U. S. 88, 96-97; *United States v. Nice*, 241 U. S. 591; *United States v. Sandoval*, 231 U. S. 28; *Tiger v. Western Investment Co.*, 221 U. S. 286. Compare *United States v. Herron*, 20 Wall. U. S. 251, 263.

tribe, the Apache tribe became confederated with the two former-named and entitled to share their reservation. If appellants' contention is correct, Congress could not have compelled the merging of these tribes or conferred on the Apaches the right to equal participation in the property of the Kiowas and Comanches if the latter had not consented thereto. Article 12 of the first of these treaties provided that no treaty for the cession of any portion of the reservation should be valid unless executed by three-fourths of all the adult male Indians. In 1892, an agreement for the cession of part of the reservation, purporting to have the required assent, was concluded but it developed that a substantial question existed as to whether a sufficient number of Indians had in fact voted in favor of the agreement. Nevertheless Congress ratified the agreement by the Act of June 6, 1900, c. 813, 31 Stat. 676. Thereafter Lone Wolf brought suit to enjoin the Secretary of the Interior from carrying out the Act. This Court, referring to Article 12 of the treaty, said (page 564):

The appellants base their right to relief on the proposition that by the effect of the article just quoted the confederated tribes of Kiowas, Comanches and Apaches were vested with an interest in the lands held in common within the reservation, which interest could not be divested by Congress in any other mode than that specified in the said twelfth article, and that as a result of the

said stipulation the interest of the Indians in the common lands fell within the protection of the Fifth Amendment to the Constitution of the United States, and such interest—indirectly at least—came under the control of the judicial branch of the government. We are unable to yield our assent to this view.

The contention in effect ignores the status of the contracting Indians and the relation of dependency they bore and continue to bear towards the government of the United States. To uphold the claim would be to adjudge that the indirect operation of the treaty was to materially limit and qualify the controlling authority of Congress in respect to the care and protection of the Indians, and to deprive Congress, in a possible emergency, when the necessity might be urgent for a partition and disposal of the tribal lands, of all power to act, if the assent of the Indians could not be obtained.\*

Surely, agreements made after Congress had ceased making treaties with the Indians and adopted a policy to govern them by acts of Con-

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\* See also *The Cherokee Tobacco*, 11 Wall., 616, 621, upholding the power of Congress to tax tobacco grown by Cherokees in the Indian Territory and there sold, in spite of a contrary provision in the treaty of July 19, 1866, 14 Stat. 799. This treaty also provided that freed persons who had been slaves of the Cherokees and freed negroes residing with the tribe should have all the rights of native Cherokees, including those in tribal lands and funds. Clearly, this provision could not have been imposed by Congress without the consent of the tribe.



gress' can have no greater sanctity than treaties. It is submitted, therefore, that appellants' case presents no exception to the rule that treaties with Indian tribes are not to be regarded as contracts but as public laws which can be abrogated at the will of Congress, *Choate v. Trapp*, 224 U. S. 665, 670-671; and that agreements have no greater effect than an act of Congress, *Gritts v. Fisher*, 224 U. S. 640, 648.

In *Sizemore v. Brady*, 235 U. S. 441, the Court was called upon to determine whether the heirs of a deceased member of the Creek tribe, entitled to enrollment under the Act of March 1, 1901, c. 676, 31 Stat. 861, called the Original Creek Agreement, were to be determined by the laws of the Creek Nation as provided in that act or by the laws of Arkansas as provided in the Act of May 27, 1902, c. 888, 32 Stat. 258, and the Act of June 30, 1902, c. 1323, 32 Stat. 500, called the Supplemental Creek Agreement. The member of the tribe through whom all the parties derived their claims had died after the enactment of the first act, but before he had received any part of the lands or funds distributable to him. In deciding in favor of the heirs under the law of Arkansas, the Court held (pp. 449, 450) that the Original Creek Agreement was not a grant *in praesenti*, since the lands and funds to which it related were tribal property and individ-

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<sup>2</sup>Act of March 3, 1871, c. 120, 16 Stat. 566, R. S. Sec. 2079. See *Cherokee Nation v. Hitchcock*, 187 U. S. 294, 305; *United States v. Kagama*, 118 U. S. 375, 382.

nal rights attached only as the act was carried into effect. Up to that time Congress retained full plenary power and, since it could have revoked the agreement and pursued any other course it considered better for the Indians, including confining the allotment and distribution to living members of the tribe, it necessarily could change the provision of the act relating to descent and distribution of the undistributed share of a deceased member even after the latter's death.

A similar question was passed upon by the Court in *Gritts v. Fisher*, 224 U. S. 640. There an act or agreement of 1902 had provided for allotting and distributing Cherokee lands and funds among the individual members of the tribe living on September 1, 1902, and an act of 1906 directed that Cherokee children born after September 1, 1902, and living on March 4, 1906, should participate in the allotment and distribution. The later act, by enlarging the number of participants, operated to reduce the distributive share to which each would be entitled, and because of this the validity of that act was questioned, the contention being that the prior act confined the allotment and distribution to the members living on September 1, 1902, and therefore invested them with an absolute right to receive all the lands and funds, and that this right could not be impaired by subsequent legislation. The Court rejected the contention, holding that, notwithstanding the purport of the act, no such rights were vested thereby as to disable Congress

from later admitting newly born members of the tribe to the allotment and distribution. The Court said (p. 648):

The difficulty with the appellants' contention is that it treats the act of 1902 as a contract, when "it is only an act of Congress and can have no greater effect." *Cherokee Inter-marriage cases*, 203 U. S. 76, 93. It was but an exertion of the administrative control of the Government over the tribal property of tribal Indians, and was subject to change by Congress at any time before it was carried into effect and while the tribal relations continued.

B. IT HAS BEEN CONSISTENT POLICY OF CONGRESS TO TREAT THE MINNESOTA CHIPPEWAS AS TRIBAL INDIANS SUBJECT IN THEIR PERSONS AND PROPERTY TO ITS GUARDIANSHIP

Since the plenary power is political and Congress alone may determine when it shall be relinquished,<sup>19</sup> its intention, expressed in the Act of 1889 and in subsequent legislation, that the tribal status of the Indians' property continue is conclusive.

The Act itself clearly reveals this intention, its very title stating that its purpose is "for the relief and civilization of the Chippewa Indians." Obviously the Indians were not considered civilized or ready to be released from the supervision of a

<sup>19</sup> *United States v. Sandoval*, 231 U. S. 28; *United States v. Nice*, 241 U. S. 591. See also *Winton v. Amos*, 255 U. S. 373, 391, 392; *Brader v. James*, 246 U. S. 88, 96; *Tiger v. Western Investment Co.*, 221 U. S. 286.

guardian. The continuing need for supervision is also apparent from the provisions of Section 7 of the Act establishing a 50-year trust period and permitting Congress from time to time throughout this period to make appropriations from the trust fund "for the purpose of promoting civilization and self-support" among the Indians. The fact that Congress contemplated that half a century might elapse before the Indians were capable of administering their property refutes the contention that it intended to abandon its plenary power in 1889. The tribal character of the fund is further evidenced by the fact that Section 7 of the Act provides that the proceeds of sale of tribal lands be deposited to the credit of "all the Chippewa Indians in the State of Minnesota," and that one-fourth of the interest on the fund thus created be used for the communal purpose of establishing and maintaining free schools. *United States v. Nice*, 241 U. S. 591, 599. Finally, the imposition of restrictions against alienation on the allotments to be made under Section 3 of the Act shows the intent to continue the guardianship of the United States.<sup>11</sup>

Subsequent legislation affecting the Chippewas shows that Congress has consistently treated them and their property as tribal. Within six months

<sup>11</sup> *United States v. Nice*, *supra*; *Levindale Lead Co. v. Coleman*, 241 U. S. 432, 437; *La Roque v. United States*, 239 U. S. 62, 66; *Heckman v. United States*, 224 U. S. 413, 436; *United States v. Rickert*, 188 U. S. 432, 437, 438; *Tiger v. Western Investment Co.*, 221 U. S. 286, 316.

after proclamation of the Act of 1889 Congress in the Act of August 19, 1890, c. 807, 26 Stat. 357, providing funds reimbursable out of the Chippewa principal fund for such purposes as houses, mills, implements, stock, seeds, schools, etc., indicated that it considered it was dealing with tribal property over which the plenary power continued to exist, for no express provision of the Act of 1889 authorized disbursements from the fund for these purposes. Between 1890 and 1926 Congress appropriated either from the trust fund or from public funds reimbursable therefrom a total of \$5,105,059 for the civilization and support of the Chippewas (Findings 9, 10, 15; R. 45-47, 49-50). During the years 1889 to 1934 Congress authorized the expenditure of public funds totaling \$5,065,878.95 for the use and benefit of the Chippewas without any stipulation for reimbursement (Finding 20; R. 54). While the appropriation of these funds is not in itself conclusive as to the continued existence of the tribe and of the plenary power of Congress, the fact that they were intended to be and were expended largely for the general benefit of the Indians as a community indicates that Congress considered that they retained their entity as a tribe subject to its will as their guardian. Moreover, in many of the acts passed by Congress during this period the Indians and their property are specifically referred to as tribal.<sup>12</sup>

<sup>12</sup> Acts of August 1, 1914, c. 222, 38 Stat. 592; May 18, 1916, c. 125, 39 Stat. 135; March 2, 1917, c. 146, 39 Stat. 979;

The decisions of the Court support the Government's contention that the tribal status of the Chippewas and the plenary power of Congress over their property continued after the Act of 1889. In *United States v. Minnesota*, 270 U. S. 181, 193-194, it was held that as late as 1923 the United States, by virtue of its *guardianship* of these Indians, had an interest sufficient to maintain a suit against the State of Minnesota for the cancellation of patents conveying ceded Indian lands. See also *Wilbur v. United States ex rel. Kadrie*, 281 U. S. 206, 221; *La Roque v. United States*, 239 U. S. 62, 66.

Appellants contend that because the Chippewa Indians in Minnesota had never been formally recognized as a tribe and possessed no tribal organization they held their property after the Act of 1889 became effective as a class of individuals (Br. 44-52). But the Act of 1889 and subsequent acts dealt with these Indians as a tribe and it is not material whether a tribal organization existed. Prior to 1889 it is beyond dispute that the Indians maintained a tribal relation to the bands of which they were members. It follows that they held their property as tribal Indians without having individually any enforceable right therein. The Act of 1889 terminated the Indian title of the various bands and ulti-

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May 25, 1918, c. 86, 40 Stat. 372; June 30, 1919, c. 4, 41 Stat. 13; February 14, 1920, c. 75, 41 Stat. 419; November 19, 1921, c. 133, 42 Stat. 221; January 30, 1925, c. 114, 43 Stat. 798; February 19, 1926, c. 22, 44 Stat. 7; March 4, 1929, c. 705, 45 Stat. 1584.



mately changed the form of the investment from lands to money, but it did not change the basic nature of the tenure of the property which remained tribal or communal. Although the Act contemplated the breaking up of the tribal relation, the transition from a state of tutelage to full emancipation was intended to be "gradual rather than an immediate." *Wilbur v. United States ex rel. Kadrie*, 281 U. S. 206, 221. It could not reasonably be otherwise, for, although it was within the power of Congress to put the Indians immediately upon a legal basis of complete equality with other people, only education acquired over a period of time could give them the degree of knowledge and civilization necessary to enable them to manage their property and compete on a basis of reasonable equality with other citizens. During this period of change in their way of life the need for a guardian would be more than ever acute and it cannot be supposed that Congress intended to surrender the power to act in this capacity which it unquestionably possessed before 1889. The fallacy in appellants' argument is that they assume there can be no plenary power in the absence of an organized tribe whereas in fact this power is an attribute of sovereignty over a subject people in a state of tutelage (cf. *United States v. Kagame*, 118 U. S. 375, 383, *Mormon Church v. United States*, 136 U. S. 1, 57) which continues to exist until they have been fully emancipated from the control and protection of the United States. The dependency of the Indians,

not the presence or absence of tribal organization, gives rise to the plenary power. Once it has attached to property, it persists until surrendered by Congress, notwithstanding that every vestige of tribal organization may have long since disappeared. *Conley v. Ballinger*, 215 U. S. 84, 90; *Winton v. Amos*, 255 U. S. 373.

The appellants, however, apparently contend that, even though, as indicated by the *Kadzie* case, the interest beneficiaries remained tribal Indians, it was contemplated that prior to the end of the 50-year trust period the remaindermen would constitute a class of emancipated individuals composed of "said Chippewa Indians and their issue then living" (Br. 25-26, 50-51). This so-called class of remaindermen, it is asserted, has a vested interest in the principal of the fund which entitles it to recover for any unauthorized diminutions thereof (Br. 66). The error in this argument is that there are not two classes composed of (1) 50 year income beneficiaries and (2) remaindermen, but one class only composed of the Chippewa Indians of Minnesota. It does not appear that Congress intended that the same persons should be treated at one and the same time as tribal Indians having individually "no title or enforceable right in the tribal property," *Choate v. Trapp*, 224 U. S. 665, 671, and also as individual Indians free of the tribal relation having, as appellants insist, continued vested personal and individual interests in a fund to be distributed at a future date. No such distinction

between the nature of the interests of the income beneficiaries and of the principal beneficiaries is suggested by section 7 or by any other provision of the Act of 1889. It follows that no rights vested in individuals when the Act of 1889 became effective. Since that time Congress has consistently recognized the continued existence of the tribe and no "class of emancipated individuals" with vested rights has come into being. Consequently, the so-called remaindermen cannot recover from the Government because of any uses made of the fund that were within its plenary power.

C. ALL THE PAYMENTS ALLEGED TO BE IN VIOLATION OF THE ACT OF 1889 WERE AUTHORIZED BY ACTS OF CONGRESS AND WERE FOR THE BENEFIT OF THE INDIANS

1. *All of the payments were authorized by acts of Congress.*—Appellants contend that the sum of \$547,421.25 was paid out of the principal fund without authority of any act of Congress (Br. 97-98). This sum forms part of \$669,606.34, which the court below found was expended under authority of the Act of 1889 (Finding 16, F. 50-51). The items composing it are set out in Finding 19 (R. 53). By far the largest of these and the one appellants particularly object to is the sum of \$531,484.43 listed as "expenses, care and sale of timber." It will be shown (*infra*, pp. 40-42) that this as well as the other expenditures complained of was reimbursable as "other expenses" in connection with carrying out the Act within the meaning of Section 7. But if any doubt existed, it would be dispelled

by the Act of June 27, 1902, c. 1157, 32 Stat. 400, 404, which amended the provisions of the Act of 1889 relating to the sale of timber and provided:

All the expenses incurred in carrying out the provisions of this Act as to the examining and listing of said lands, and the selling, cutting, and scaling of said timber, shall be paid by the Secretary of the Interior out of the proceeds of the sale of said timber \* \* \*

Appellants also claim that of \$2,350,559 appropriated out of public funds from 1890 to 1910, inclusive, "to enable the Secretary of the Interior to carry out an Act entitled 'An Act for the relief and civilization of the Chippewa Indians in the State of Minnesota, and for other purposes,' approved January 14, 1889," \$2,010,461.37 was expended for unauthorized purposes not connected with carrying out the Act and consequently reimbursement therefor was improper (Findings 9 and 10; R. 45-47; Br. 81-88). The uses to which this money was put are listed in the findings (R. 46, 47). Appellants assume that "carrying out" the Act was intended to refer only to the mechanical details of effecting its immediate purposes, such as defraying the expenses of surveys, removals, and making allotments. The very size and continuity of the appropriations negative any such narrow intent. The larger purpose of the Act, as its title plainly states, was the relief and civilization of the Indians; and all of these expenditures were de-

signed to carry out this purpose. Moreover, the Acts of Congress appropriating the funds demonstrate that appellants' contention is without foundation by providing that part of the money shall be used for such purposes as houses, saw mills, flour mills, implements, stock, seeds, fencing and breaking land, schools, etc.<sup>13</sup>

2. *All of the payments were for the benefit of the Indians.*—Appellants do not contend, except with respect to expenses of Indian agencies, education, and certain minor items (Br. 85-87, 93-96), that all disbursements made from either the principal or interest fund were not applied for the benefit of the Indians. The Court of Claims found that all these expenditures were for their use and benefit (Findings 9-17, 19; R. 45-54).

With respect to payments out of the Chippewa fund to cover the expenses of maintaining Indian agencies, which appellants claim should be borne by the Government (Br. 85-87, 93-96), the Court

<sup>13</sup> Acts of August 19, 1890, c. 807, 26 Stat. 357; July 13, 1892, c. 164, 27 Stat. 138; March 3, 1893, c. 209, 27 Stat. 632; August 15, 1894, c. 290, 28 Stat. 289-290; March 2, 1895, c. 188, 28 Stat. 880-881; June 10, 1896, c. 398, 29 Stat. 326; June 7, 1897, c. 3, 30 Stat. 67; July 1, 1898, c. 545, 30 Stat. 575, 576; March 1, 1899, c. 324, 30 Stat. 928; May 31, 1900, c. 598, 31 Stat. 226; March 3, 1901, c. 832, 31 Stat. 1063; May 27, 1902, c. 888, 32 Stat. 249; March 3, 1903, c. 994, 32 Stat. 986; April 21, 1904, c. 1402, 33 Stat. 193-194; March 19, 1905, c. 1479, 33 Stat. 1051; June 21, 1906, c. 3504, 34 Stat. 350; March 1, 1907, c. 2285, 34 Stat. 1033; April 30, 1908, c. 153, 35 Stat. 82; March 3, 1909, c. 263, 35 Stat. 794; April 4, 1910, c. 140, 36 Stat. 276.

of Appeals of the District of Columbia said: "The agencies exist for the benefit of the Indians, and it was proper that the government, their guardian, in the administration of the trust fund, should pay the expense of maintaining them." *Morrison v. Fall* (App. D. C. 1923) 290 Fed. 306, 311, *aff'd sub nom. Morrison v. Work*, 266 U. S. 481. See also *Blackfeet Nations v. United States*, 81 C. Cls. 101, 137-138. The general public pays in taxes for the services rendered to it. It is just that the Indians who are not taxed, should be charged for the local expense of administering their affairs.

Appellants assert that payments out of the fund to the Minnesota Public School System for tuition of Chippewa children and for purchasing school grounds and erecting school buildings were not for the benefit of the Indians because Article VIII of the Constitution of Minnesota made it mandatory that a system of schools be maintained in each township and statutes of that state provided that the schools should be free (Br. 95-96).<sup>14</sup> However, Minnesota statutes also provided that the establishment of a school district was discretionary with the board of county commissioners and that taxes for the support of the public schools in each dis-

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<sup>14</sup> Payments out of principal directly for education are also objected to on the ground that free schooling should under the Act of 1889 be paid for out of interest. It seems sufficiently plain that education was beneficial and that, if interest was inadequate, principal could be used for this purpose.



trict could be levied and collected upon the property therein. (Sess. Laws, Minn., 1877, pp. 115-118, 121-125; Gen. Stats., Minn., 1913, secs. 2671-2675, 2915-2917; Minn. Gen. Stats. 1923, secs. 2742-2746, 3011-3013; Minn. Stats. 1927, secs. 2742-2746, 3011-3013.) It is reasonable to assume that a district accessible to Indians might be financially unable to maintain school facilities on a sufficient scale to take care of Indian pupils unless the Indians who were not subject to taxation were able to make some contribution to their support. Where the establishment of a school exclusively for the Indians would entail greater expense than helping to support a state school for both Indians and Whites, it is obvious that the latter method was for the benefit of the Indians.

Appellants object to expenditures for burial of Indians, annual celebrations at White Earth, payments to former chiefs of the Mille Lac Band and purchases of land for allotment to individual Indians on the ground that they have no connection with civilization and self-support (Br. 96). It may be assumed that only indigent Indians were buried at the expense of the tribe. The expenditure of public funds for this purpose is necessary in any civilized community. Payments for the annual celebration at White Earth were made under specific appropriations by Congress.<sup>15</sup> It is obvious, even

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<sup>15</sup> See for example Acts of March 3, 1911, c. 210, 36 Stat. 1065; August 24, 1912, c. 388, 37 Stat. 525; May 25, 1918, c. 86, 40 Stat. 572; February 14, 1920, c. 75, 41 Stat. 419.

if the determination by Congress were not conclusive, that such meetings would tend to advance civilization among the Chippewas. The payment to the Mille Lac chiefs was authorized by the Act of February 9, 1925, c. 164, 43 Stat. 818, "for services rendered and money expended in connection with the preparation and prosecution of the said [*United States v. Mille Lac Chippewas*, 229 U. S. 498] case. Judicious resort to litigation would tend to promote self-support, and it is proper that the tribe, which received the benefit, should bear the expense. The purchase of land for individual allotment resulted from the refusal of certain Mille Lac Indians to remove to the White Earth Reservation. Section 3 of the Act of 1889 permitted any Indian to choose his allotment on his home reservation, but as a result of the judgment in the *Mille Lac case*, *supra*, no lands in the Mille Lac Reservation remained available for allotment. By the Act of August 1, 1914, c. 222, 38 Stat. 591, Congress authorized the use of not more than \$40,000 for "the purchase of lands for homeless, nonremoval Mille Lac Indians, to whom allotments have not heretofore been made \* \* \*." \$40,017.31 was expended for this purpose. Certainly the making of allotments in conformity with the provisions of the Act tended to promote civilization and self-support. In any event appellants are not injured, for the full value of that part of the Mille Lac reservation which, but for its disposal, would have been avail-

able for allotment to these Indians, was paid into the principal fund.<sup>16</sup>

It is submitted, therefore, that all payments out of the Chippewa fund were for the benefit of the Indians and hence were within the scope of the plenary power of Congress and that, since the Act of 1889 did not exhaust this power and Congress never surrendered it, the Court of Claims correctly dismissed appellants' petition.

D. CHARGES OF IMPROVIDENT ADMINISTRATION OF THE FUND,  
EVEN IF MATERIAL, ARE WITHOUT BASIS IN FACT

Appellants contend (Br. 67-70) that, if the trust had been administered in accordance with the Act of 1889 and only such deductions from principal made as were therein specifically authorized, the

<sup>16</sup> Appellants in their assignments of error (No. X, R. 82) object to the holding of the court below that money appropriated for drainage surveys was reimbursable, but since the point is not argued it has presumably been abandoned. The Court of Claims found (R. 47) that the money so expended was applied for the benefit of the Indians and said in its opinion (R. 70-71):

"The extent of the funds to be realized from the sale of surplus land was dependent upon their classification. Swamp lands if susceptible to drainage would enhance in value, and what the Government did was for the express benefit of the tribe. To bring the swamp areas into a state of cultivation was in direct accord with the intent of the Act of 1889, which by express terms contemplated, if it did not express, an intent to bring the estate to the point of its greatest value."

In fact, the drainage surveys did result in the reclamation of land which the Attorney General directed should be sold and the proceeds credited to the Indians (29 Op. A. G. 455, 468).

principal of the fund would have reached \$15,000,000 and earned \$750,000 a year. Applying these figures to the period from 1912 to 1927, inclusive, appellants assert that the Indians would have received \$12,000,000 in interest and maintained their fund intact, whereas, in fact they received only \$11,000,000 of which \$4,000,000 represented interest earned by the fund and the balance, payments out of principal. This argument might be persuasive if its premise were based on fact. On October 31, 1910—before any reimbursements had been taken (other than such sums as may have been deducted for surveys, allotments, etc., in accordance with Sec. 7 of the Act)—there was \$6,901,163.68 in the fund (H. R. Doc. 1167, 61st Cong., 3rd Sess.; Cong. Doc. Series No. 6069). Since it took twenty years for the fund to reach this total, it is reasonable to assume that it did not more than double in value in less than a year thereafter. Appellants' \$15,000,000 figure, reached by deducting disbursements conceded to be proper, includes all sums paid into the principal fund up to 1927 (Finding 13, R. 47-48), and does not represent, as appellants' argument implies, the total in 1912.<sup>17</sup>

There is thus no foundation for appellants' contention that the interest on the fund would have been ample for the Indians in any emergency and no proof that Congress did not act wisely and for

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<sup>17</sup> See Appendix showing accruals to the fund during this period. These figures are taken from the report of the Comptroller General referred to in the findings (R. 50).

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their benefit in authorizing the disbursements from principal.

But even if the administration of the fund had been improvident, it would afford no basis for relief in this action, for as this Court said in *Cherokee Nation v. Hitchcock*, 187 U. S. 294, 308:

We are not concerned in this case with the question whether the act of June 28, 1898, and the proposed action thereunder, which is complained of, is or is not wise, and calculated to operate beneficially to the interests of the Cherokees. The power existing in Congress to administer upon and guard the tribal property, and the power being political and administrative in its nature, the manner of its exercise is a question within the province of the legislative branch to determine, and is not one for the courts.

## II

EVEN IF CONGRESS WAS REQUIRED TO ADMINISTER THE TRUST FUND STRICTLY IN ACCORDANCE WITH THE ACT OF 1889, THE APPELLANTS ARE NOT ENTITLED TO RECOVER

A. CERTAIN EXPENDITURES AND REIMBURSEMENTS COMPLAINED OF EITHER WERE AUTHORIZED BY THE ACT OF 1889 OR ARE NOT SHOWN BY THE RECORD TO BE UNAUTHORIZED BY THAT ACT

1. The charge of \$896,246.93 to principal account as partial reimbursement of interest advanced under the Act (Finding 8; R. 45) is claimed to exceed the authorized charge against principal by



\$232,010.91 (Br. 78-81).<sup>18</sup> Section 7 of the Act provides:

The United States shall, for the benefit of said Indians, advance to them as such interest as aforesaid the sum of ninety thousand dollars annually, counting from the time when the removal and allotments provided for in this act shall have been made until such time as said permanent fund, *exclusive of the deductions hereinbefore provided for*, shall equal or exceed the sum of three million dollars, less any actual interest that may in the meantime accrue from accumulations of said permanent fund; \* \* \* and whenever said permanent fund shall exceed the sum of three million dollars the United States shall be fully reimbursed out of such excess for all the advances of interest made as herein contemplated and other expenses hereunder. [Italics supplied.]

In making its computations appellants have ignored the fact that the Act contemplated that the expenses of making the census, obtaining the cessions, making the removal and allotments, and completing the surveys and appraisals should be deducted from the proceeds of sale of the ceded lands before being deposited in the trust fund. At the end of the fiscal year 1907 the total amount expended out of public funds for purposes for which deductions were authorized from the proceeds of

<sup>18</sup> Appellants' specific claims are summarized in the Statement, *supra*, pp. 5-7.

sale of lands was at least \$624,944.66,<sup>19</sup> but this amount was not reimbursed from the fund until 1911 (Finding 18; R. 52). It is apparent that, if deductions had consistently been taken as expenditures were made, the fund would have earned less interest in the early years and taken longer to reach the total of \$3,000,000 and the Government would have had the right under the Act to reimbursement out of the principal fund in a larger amount than that shown by appellants' computation. In the absence of any findings of fact from which the correct amount can be ascertained, it is to be presumed that the Government officials performed their duties correctly in their apportionment of the reimbursement between the principal and interest funds.

2. Appropriations totalling \$2,754,500, of which \$2,526,267.74 was expended, were made from 1911 to 1926, inclusive, directly from the principal fund (Findings 15, 17, 19; R. 49-54). Appellants claim that the amount authorized to be expended out of principal for purposes of civilization and self-support was 5 per cent of the total sum paid into the principal fund after admittedly authorized deductions had been made. This appellants variously

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<sup>19</sup> The further sum of \$328,163.95 was expended for like purposes between 1891 and 1913 and reimbursed out of the principal fund on various dates from 1911 to 1913 (R. 46). The dates of the expenditures do not appear, but from their nature it is reasonable to assume that most of them were made before 1907.

compute at \$800,000 and \$883,116.29 and seek to recover the balance (Br. 89-93).

Section 7 of the Act contains the following proviso:

*Provided, That Congress may, in its discretion, from time to time, during the said period of fifty years, appropriate, for the purpose of promoting civilization and self-support among the said Indians, a portion of said principal sum, not exceeding five per centum thereof.*

Appellants' contention that this proviso limits appropriations for civilization and self-support to a total of \$800,000 or \$883,116.29 for the fifty-year period is untenable. In 1889 there were 8,304 Chippewa Indians.<sup>20</sup> Even disregarding the probable increase in population after 1889 the average amount available annually for each Indian would, under appellants' contention, have been about \$2 or a total of \$100 over the trust term. It is not conceivable that Congress believed that civilization and economic self-sufficiency could be so cheaply bought. Such a circumscribed fund bears no resemblance to that of which the Indians at White Earth were told (H. Ex. Doc. 247, 51st Cong., 1st Sess., p. 86). "In case of the failure of crops or any unforeseen misfortune here is a store-house of money to be drawn upon for your wants." Under appellants' construction, upon the disbursement of 5 per cent of the fund the doors of this storehouse

<sup>20</sup> H. Ex. Doc. 247, 51st Cong., 1st Sess., p. 9; *Wilbur v. United States ex rel. Kadric*, 281 U. S. 206, 208.

swung shut not to reopen until the end of the 50-year term. In the meantime the very persons who with their issue would ultimately share its contents might suffer want and privation. Neither Congress nor the Indians could have contemplated such a result, and the wording of the statute is entirely consistent with the more reasonable interpretation that the 5 per cent limitation was on the amount of each appropriation. None of those complained of exceeded that amount (Finding 15; R. 49-50).

Appellants also seek to recover the sum of \$2,010,461.37, expended out of public funds under appropriations for civilization and relief during the years 1890 to 1910 and reimbursed out of the trust fund as required by the various acts (Findings 9, 10; R. 45-47; Br. 81-88). These disbursements were for purposes similar to those referred to in the preceding paragraph. It is immaterial that they were made out of public funds and later reimbursed to the United States instead of directly out of the trust fund, since the lapse of time between expenditure and reimbursement worked directly to the advantage of the Indians receiving interest from the fund. Although it does not appear in the record, in the early years these appropriations exceeded 5 per cent of the trust fund, but to what extent cannot be ascertained from the record and is not known.

3. Appellants claim that \$547,421.25 was paid out of the trust fund without authority of any Act of Congress (Br. 97). The court below found that

this sum was part of \$669,606.34 expended from the fund under authority of the Act of 1889 itself (Findings 16, 19; R. 50-51, 53-54).

Appellants now contend that Section 7 of the Act sets out in detail the expenses which were properly chargeable against the fund. These included only expenses "of making the census, of obtaining the cession and relinquishment, of making the removal and allotments, and of completing the surveys and appraisals" and hence exclude expenses in connection with the care and sale of timber, which accounts for \$531,484.43 of the \$669,606.34 referred to above (Finding 19, R. 53).<sup>21</sup> This expenditure was necessary to carry out the Act and the care of the timber prior to sale was essential if its full value was to be realized for the Indians.

Appellants' theory that the Act required the United States to bear these expenses not only finds no support in the Act but is contrary to the express provision of Section 7 that when the fund exceeded \$3,000,000 "the United States shall be fully reimbursed out of such excess for all the advances of interest made as herein contemplated and other expenses hereunder." Plainly these "other expenses" which are to be reimbursed from the fund are not the same as those specifically set forth in the Act which by its terms are to be deducted from

<sup>21</sup> Apparently appellants have abandoned any claim that the expenditure of the balance of the \$547,421.25 was unauthorized (Br. 97-98).

the proceeds of ceded land before such proceeds are placed in the Treasury. As to the latter there could never be any occasion for reimbursement from the fund.

B. ANY DAMAGE WHICH MAY HAVE BEEN SUFFERED BY REASON OF PER CAPITA CASH PAYMENTS TO INDIVIDUAL INDIANS IS AT PRESENT PURELY CONJECTURAL

Appellants seek to recover the sum of \$5,684,341.50 (Br. 98-103) on account of per capita cash payments made to the individuals constituting the Chippewa Indians of Minnesota between 1916 and 1927 pursuant to appropriations out of the trust fund by Acts of Congress<sup>22</sup> ratified by the Indians (Findings 21, 23; R. 54-56). It is obvious that the persons who received these payments and released *pro tanto* their interest in the principal of the trust (Finding 23) were at the time of the payments not only the income beneficiaries but also the ultimate distributees of the trust fund. Only death prior to the time of distribution could defeat this latter interest. Those then living, all of whom participated in the payments, ratified the acts, and signed acquittances, are in no position to complain either on account of payments made to them<sup>23</sup> or on ac-

<sup>22</sup>Acts of May 18, 1916, c. 125, 39 Stat. 135; November 19, 1921, c. 133, 42 Stat. 221; January 25, 1924, c. 2, 43 Stat. 1; January 30, 1925, c. 114, 43 Stat. 798; February 19, 1926, c. 22, 44 Stat. 7. These acts are set forth in an appendix to the opinion of the court below (R. 77-79).

<sup>23</sup>Appellants admit that the shares of those living on the date of distribution are chargeable with advances received (Br. 108-109). See Restatement, Trusts, Sec. 255.



count of payments simultaneously made to Indians who have since died. Thus the only persons who have any standing are those who have been born since the per capita distributions were made. The record does not reveal the number of such persons or, indeed, that any exist, but, even if it did, it could not show the number there will be on the date of distribution. At most the right of distributees of the fund born after the payments in question and living when the trust terminates is to receive their distributive shares unaffected by the per capita payments.<sup>24</sup> Any deficiency in the fund which might exist on the date of distribution would be chargeable to the trustee, if at all, only to the extent that payments in excess of those authorized were made to Indians who had then died or payments to Indians who then survive exceeded their full distributive shares. But it is manifestly impossible to ascertain at this time the number of those who did not receive payments who will then be alive, the number of those who received payments who will then be dead, or the amount that will then be held in trust. Since, on the date of distribution the fund may be adequate to pay in full all those who can conceivably have a right to complain, any damage they may have suffered is purely speculative.<sup>24</sup> Authorities cited by appellants (Br.

<sup>24</sup> The special jurisdictional act as amended provides that "the plaintiffs, the Chippewa Indians of Minnesota, shall be considered as including and representing all those entitled to share in the final distribution of the permanent fund." This, however, does not permit recovery by so-called remainder-

106, 107) to the effect that a trustee is obligated to restore to the trust fund all moneys wrongfully disposed of, although no injury to the remainder occurs until the trust terminates, can have little application when the trustee is the United States which will continue able to respond for any damage that might be suffered, when the trust fund is not a res but only an entry on the books of the Treasury, and when an unascertainable number of the remaindermen are present interest beneficiaries who have received the payments complained of.

#### C. INTEREST

In the second amended petition (R. 30-32) appellants ask for interest from the date of disbursement on each of the amounts for which recovery is sought. So far as the so-called remaindermen are concerned, any award of interest would constitute a windfall, since, even if all distributions and expenditures of principal were unauthorized, they would only be entitled to have the fund made whole. If, on the other hand, recovery of interest is sought for income beneficiaries, only those would be entitled to it who did not consent to disbursements unauthorized by the Act of 1889. Restatement, Trusts, Sec. 216. As has been shown, the record

men of damages which cannot be liquidated or determined until some time in the future. The jurisdictional act "merely provides a forum for the adjudication of the claim according to applicable legal principles." *United States v. Mille Lac Chippewas*, 229 U. S. 498, 500.

contains no facts on which the amount of such interest, if any, could be computed. Appellants, however, contend that Sec. 4 of the jurisdictional act (R. 34-35) requires that interest be added to the amount of any judgment (Br. 105). Plainly the jurisdictional act "confined" any judgment to the value of the property appropriated and interest, and by conferring this remedy did not create a right to interest not otherwise recoverable upon applicable legal principles. See *United States v. Mille Lac Chippewas*, 229 U. S. 498, 500.

#### D. GRATUITIES

Sec. 1 of the jurisdictional act, as amended (R. 34), provides that "the plaintiffs, the Chippewa Indians of Minnesota, shall be considered as including and representing all those entitled to share in the final distribution of the permanent fund." Sec. 3 allows "gratuities, if any, paid to or expended for said Indians subsequent to January 14, 1889" to be pleaded as an offset.

The court below found that between January 14, 1889, and June 30, 1934, the United States expended \$5,065,878.95 out of public funds for which no reimbursement has been made (Finding 20; R. 54). The extent to which these expenditures may be offset as gratuities was not decided by the Court of Claims and would be a matter for determination by it in the event of retrial.

## CONCLUSION

All disbursements from the principal fund were authorized by Congress and were within its power of guardianship which was not exhausted by the Act of January 14, 1889, and the ensuing agreements with the Indians, nor subsequently abandoned. Even assuming that Congress was required to administer the Chippewa fund strictly in accordance with the Act, the record fails to show any violations of its terms except in the distribution of cash to individuals with the consent of each and of the tribe as a whole and as to this no damage can be shown at this time. It is therefore respectfully submitted that the judgment of the Court of Claims should be affirmed.

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MARCH 1939.

## APPENDIX

### CHIPPEWAS OF MINNESOTA FUND

Abstract of deposits made in the permanent or principal fund set up in the United States Treasury under Sec. 7, Act of January 14, 1889 (25 Stat. 642):

*Deposits up to and including Dec. 31, 1911*

Sales of land and timber-----	\$8,394,891.90
(The balance in this fund on Oct. 31, 1910, was \$0,901,163.68, H. R. Doc. No. 1167, 61st Cong., 3d Sess.; Cong. Doc. Series 0069.)	
1912. Sales of land and timber-----	662,435.14
1913. Sales of land and timber-----	1,021,285.78
1914. Sales of land and timber-----	813,669.47
1915. Sales of land and timber-----	535,292.56
1916. Judgment <i>Mille Lac</i> case (39 Stat. 823)-----	\$610,354.24
Sales of land and timber-----	534,379.00
	1,144,733.24
1917. Sales of land and timber-----	365,648.25
1918. Sales of land and timber-----	273,342.04
1919. Sales of land and timber-----	360,325.90
1920. Sales of land and timber-----	182,065.29
1921. Sales of land and timber-----	97,767.77
1922. Sales of land and timber-----	97,001.70
1923. Minnesota Nat'l Forest Award (35 Stat. 268; <i>Chippewa Indians of Minnesota</i> case, decided Jan. 12, 1938, unreported; Record in No. 244, Oct. Term, 1938, Supreme Court)-----	\$1,490,195.58
Sales of land and timber-----	143,625.48
	1,633,821.06

1924. Sales of land and timber.....	\$173,412.13
1925. Sales of land and timber.....	30,132.87
1926. Appropriation in payment for lands entered under the Free Homestead Act (44 Stat. 173)....	\$1,787,751.36
Sales of land and timber.....	42,737.59
	<hr/> 1,830,488.95
1927 to May 31. Sales of land and timber.....	10,043.32
	<hr/> 17,626,357.37
Deposits, 1890-1927. Included with the above, eleven items of deposit from various sources were made during the years 1890-1927 aggregating.....	35,968.33
	<hr/> 17,662,325.70

## EXPLANATION OF DEPOSITS

All of the foregoing amounts are shown by the General Accounting Office report, filed in the Court of Claims, Case No. H-155. For sales of land and timber, see Report pp. 173, 876-878.

The *Mille Lac* judgment was for \$689,460.54, and interest \$24,393.70, aggregating \$713,854.24 (51 Ct. Cls. 400). The latter amount was first set up in a special account, out of which, during the fiscal year 1917, the sum of \$103,500 was disbursed as attorneys' fees. Thereafter the balance, shown above, was transferred to ~~the~~ Chippewas of Minnesota Fund. Nothing was transferred to the Interest Fund. (See Rept. pp. 162, 163, 173, 178, 253, 849.)

The Free Homestead Appropriation, made in 1926, was to compensate the Indians for ceded lands entered under the act of May 17, 1900 (31 Stat. 179), \$1,787,751.36, credited to the principal fund, and \$303,917.67 for interest, credited to the interest fund.

The eleven deposit items, for which no dates are given, came from various sources. Some appear to be consolidations of sundry receipts during the en-



tire accounting period. Approximately \$13,000 appear to have been from sales of land and timber, and approximately \$23,000 from refunds, or payments in the nature of refunds, of moneys theretofore disbursed from the principal fund. These eleven items are set out in Statement No. 15, page 173, General Accounting Office report.

The total of \$17,662,325.70, in the foregoing table, agrees with the General Accounting Office Report (p. 173), and with Finding 13 of the Court of Claims.



# SUPREME COURT OF THE UNITED STATES.

No. 666.—OCTOBER TERM, 1938.

Chippewa Indians of Minnesota, Ap- pellants, vs. The United States.	} Appeal from Court of Claims.
--	-----------------------------------

[April 17, 1939.]

Mr. Justice ROBERTS delivered the opinion of the Court.

This is an appeal from a judgment of the Court of Claims<sup>1</sup> dismissing a suit brought to compel restoration of trust funds alleged to have been diverted by the appellee.

In 1926 Congress granted permission for the bringing of the suit,<sup>2</sup> which was instituted April 13, 1927. In order to permit the claim to be presented in its present form the permissive act was amended in 1934.<sup>3</sup> The appellants then filed an amended petition to which the appellee responded by a general traverse. The right of appeal from the judgment of the Court of Claims is conferred by Joint Resolution of June 22, 1936.<sup>4</sup>

The suit is for the enforcement of equitable claims arising under or growing out of the Act of January 14, 1889.<sup>5</sup> The appellants' theory is that the Act constituted an offer on the part of Congress for an agreement with the bands of Chippewas located in Minnesota, whereby, if these bands would cede the Indian title to their reservations, (which they did), the United States would sell the timber thereon and open the agricultural lands to settlement, and hold the proceeds of the timber and the lands, in trust, to expend the income for purposes specified in the statute, including payment of a portion of such income to the Indians, and to distribute the

<sup>1</sup> — Court of Claims —.

<sup>2</sup> Act of May 14, 1926, c. 300; 44 Stat. 555, as amended by Acts of April 11, 1928, c. 357, 45 Stat. 423, and June 18, 1934, c. 568, 48 Stat. 979.

<sup>3</sup> Act of June 18, 1934, c. 568, 48 Stat. 979.

<sup>4</sup> c. 714, 49 Stat. 1826.

<sup>5</sup> 25 Stat. 642.

principal at the expiration of fifty years after allotments had been completed to all the members of the various bands on specified reservations. The circumstances leading to the adoption of the Act and its relevant sections appear in earlier decisions of this Court and need not here be repeated.<sup>6</sup>

The appellants assert that, by the Act of 1889, Congress abdicated its plenary power of administration of the Chippewas' property as tribal property, recognized that the reservations of the respective bands were not tribal property, and agreed to hold the proceeds of the ceded lands in strict and conventional trust for classes of individual Indians in accordance with the program outlined in the Act.

In this view the living Chippewas are beneficiaries of the income of the fund during the fifty year period, and individual Chippewa Indians who may be living at the expiration of the period, as a class, are remaindermen. It is urged that, as Congress has, from time to time, reimbursed the Treasury for expenditures for the benefit of the Chippewa Indians of Minnesota out of the fund, and has authorized other direct expenditures from the fund for the benefit of the Indians in ways not authorized by the Act, the United States has been guilty of a diversion of trust funds and that the appellants, as the representatives of the remaindermen, are entitled, on plain principles of equity, to demand restoration of the diverted sums to the corpus.

If, as the Court of Claims has found, the Act of 1889, and the cessions made pursuant to it, did not create a technical trust, we are relieved from considering many of the contentions pressed by the appellants in that court and here. We are of opinion that the Court of Claims was right in its decision that no such trust was created.

The original tribal status of the Chippewas is described in *Wilbur v. United States*, 281 U. S. 206, 208, and *Chippewa Indians v. United States*, 301 U. S. 358, 360. It is unnecessary now to restate what was there said on the subject.

It is true that, prior to the adoption of the Act of 1889, the tribe had been broken up into numerous bands, some of which held Indian title to tracts in the State of Minnesota. The Act refers to these collectively as "The Chippewas in the State of Minnesota." Whether or not the tribal relation had been dissolved prior to its

<sup>6</sup> *Wilbur v. United States*, 281 U. S. 206, 209, 210; *Chippewa Indians v. United States*, 301 U. S. 358, 362.

adoption, the Act contemplates future dealings with the Indians upon a tribal basis. It exhibits a purpose gradually to emancipate the Indians and to bring about a status comparable to that of citizens of the United States. But it is plain that, in the interim, Congress did not intend to surrender its guardianship over the Indians or treat them otherwise than as tribal Indians.

This is evidenced by a series of acts, the first of which was adopted nineteen months after the Act of 1889, which are inconsistent with the view that the Congress considered the Indians as emancipated or intended to enter into a binding contract with them as individuals.<sup>7</sup> Many of these statutes refer to the Chippewas of Minnesota as a tribe.<sup>8</sup> Moreover, an examination of the Act of 1889 discloses that it is not cast in the form of an agreement; and, we may not assume that Congress abandoned its guardianship of the tribe or the bands and entered into a formal trust agreement with the Indians, in the absence of a clear expression of that intent.

It is not contended that the expenditures made from the fund, or reimbursed from it, were not for the benefit of the Indians or were not such as properly might be made for their education and civilization, the purposes stated in the Act of 1889.

We hold that the Act did not tie the hands of Congress so that it could not depart from the plan envisaged therein, in the use of the tribal property for the benefit of its Indian wards.

The judgment of the Court of Claims is affirmed.

A true copy.

Test:

*Clerk, Supreme Court, U. S.*

<sup>7</sup> Aug. 19, 1890, c. 807, 26 Stat. 335, 357. Between 1890 and 1926 Congress appropriated, either from the fund created under the Act of 1889 or from public funds reimbursable therefrom, a total of \$5,105,059 for the civilization and support of the Chippewas. (Findings 9, 10, 15.) During the period 1889 to 1934 Congress authorized the expenditure of public funds totaling \$5,065,878 for the use and benefit of the Chippewas without any provision for reimbursement. (Finding 20.)

<sup>8</sup> Aug. 1, 1914, c. 222, 38 Stat. 582, 592; May 18, 1916, c. 125, 39 Stat. 134, 135; March 2, 1917, c. 143, 39 Stat. 969, 979; May 25, 1918, c. 86, 40 Stat. 561, 572; June 30, 1919, c. 4, 41 Stat. 3, 14; February 14, 1920, c. 75, 41 Stat. 408, 419; November 19, 1921, c. 133, 42 Stat. 221; January 30, 1925, c. 114, 43 Stat. 798; February 19, 1926, c. 22, 44 Stat. 7; March 4, 1929, c. 705, 45 Stat. 1562, 1584.

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